LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAY 31 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 141

CARL I. COHEN,

Petitioner,

—v.—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

[With Supplemental Appendix in Separate Volume]

KLEINMAN, GOLD & LANDSMAN
Attorneys for Petitioner
66 Court Street
Brooklyn 1, New York

Of Counsel:
ABRAHAM GLASSER
52 Eighth Avenue
New York, N. Y. 10014

32 CASE PRESS INC., 421 HUDSON ST., N.Y.—OREGON 5-4540

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	11
Constitutional and Statutory Provisions Involved	14
Statement of the Case and of How the Federal Questions Are Presented	15
Reasons for Granting the Writ	19
I. Questions Presented No.'s 1, 2, 3, 4, 5, 6	19
II. Question Presented No. 7	21
III. Question Presented No. 8	23
IV. Question Presented No. 9	36
Spoliation of Evidence and Improper Keeping of Records	37
The Extraordinary Conduct of the Police in Extracting Alleged Admissions from the Complainant Esther Richards	44
Further Remarks as to the Relationship Between the Wiretap and the Search	46
Conclusion	48

APPENDIX TO PETITION

[See Also Supplemental Appendix Printed in Separate Volume]

Appendix A—Decision of New York Court of Appeals After Reargument (April 18, 1968)	1a

PAGE

APPENDIX AA—Remittitur of New York Court of Appeals 3a

APPENDIX B—"Memorandum" Report of Decision (July 7, 1966) of New York Court of Appeals (Including Dissenting Opinion of Chief Judge Desmond and Judge Fuld), 18 N.Y. 2d 650 ..... 6a

APPENDIX C—Opinion of Appellate Division, Second Department, Supreme Court of New York, 24 A.D. 2d 900 ..... 10a

APPENDIX D—Opinion of Justice Rinaldi, Supreme Court of New York, Kings County, 42 Misc. 2d 403 12a

APPENDIX E—Statutes Involved 22a

1. 47 U.S.C. §605 ..... 22a
2. N.Y. Code Crim. Proc. §518-a 23a
3. N.Y. Code Crim. Proc. §813-a 24a
4. N.Y. Code Crim. Proc. §§813-c to 813-e 25a

AUTHORITIES CITED

Cases

Benanti v. United States, 355 U.S. 96 20
Berger v. New York, 388 U.S. 41 .....6, 7, 8, 11, 12, *passim*
Brady v. Maryland, 373 U.S. 83 40
Campbell v. United States, 373 U.S. 487 39
Carlo v. United States, 286 F. 2d 841 (C.A. 2, 1961) 29
Cohen v. New York, cert. denied 385 U.S. 976, reh. denied 385 U.S. 1032 4
Dailey v. United States, 261 F. 2d 870 (C.A. 5, 1958), cert. denied 359 U.S. 969 29

PAGE

Desist v. United States, No. 909, October Term, 1967, certiorari granted March 4, 1968 ..... 8, 9, 11
Di Bella v. United States, 284 F. 2d 897 (C.A. 2, 1960) 29
Draper v. United States, 358 U.S. 307 ..... 23, 28

Go-Bart Importing Co. v. United States, 282 U.S. 344 37

Henry v. United States, 361 U.S. 98 ..... 28, 37
Hobson v. United States, 226 F. 2d 890 (C.A. 8, 1955) 29

Johnson v. New Jersey, 384 U.S. 719 9
Jones v. United States, 362 U.S. 257 ..... 37, 45

Katz v. United States, October Term, 1967, No. 35 ..... 7, 8, 9, 11, *passim*

Lee v. Florida, No. 174, October Term, 1967 ..... 9, 20
Linkletter v. Walker, 381 U.S. 618 9
Lopez v. United States, 373 U.S. 427 ..... 33, 34

Metallic Flowers v. City of New York, 4 A.D. 2d 292, 164 N.Y.S. 2d 227 (1st Dept. 1957) 39

Osborn v. United States, 385 U.S. 323 ..... 27, 29, 33, 34, 35

People v. Agron, 10 N.Y. 2d 130 39
People v. Bell, 21 A.D. 660 (1964) 39
People v. Dinan, 11 N.Y. 2d 350 20
People v. Genova, 15 A.D. 2d 44 (1961) 39
People v. Grossman, 45 Misc. 2d 557, 257 N.Y.S. 2d 266 (S. Ct. Kings Co. 1965) 23
People v. Kaiser, 21 N.Y. 2d 86, certiorari granted April 22, 1968, No. 1451 Misc. ..... 8, 9, 18, 20, *passim*
People v. McCall, 17 N.Y. 2d 152 ..... 28, 29
People v. Rosario, 9 N.Y. 2d 286 39
People v. Strollo, 191 N.Y. 42 (1908) 33

Rios v. United States, 364 U.S. 253 ..... 37, 43
Rochin v. California, 342 U.S. 165 ..... 45, 46

Stovall v. Denno, 388 U.S. 293 10

Tehan v. Shott, 382 U.S. 406 9

PAGE

United States v. Joines, 258 F. 2d 471 (C.A. 3, 1958), cert. denied 358 U.S. 880 29
United States v. Rabinowitz, 339 U.S. 56 ..... 37, 43
United States v. Ramirez, 279 F. 2d 712 (C.A. 2, 1960) 28
United States v. Ventresca, 380 U.S. 102 27

Wong Sun v. United States, 371 U.S. 471 46
Wrightson v. United States, 222 F. 2d 556 (C.A. D. C. 1955) 29

U. S. Constitution

Fourth Amendment ..... 11, 12, 13, 14 *passim*
Fifth Amendment 12, 13
Fourteenth Amendment 10, 14
Article VI 11, 12, 14

Statutes

N.Y. Code Crim. Proc. §249 45
N.Y. Code Crim. Proc. §813-a ..... 7, 10, 12, 13 *passim*
N.Y. Code Crim. Proc. §813-c, 813-d, 813-e 14
N.Y. Code Crim. Proc. §518-a 16
28 U.S.C. §1651 ..... 10, 11
28 U.S.C. §1257 (3) 10
47 U.S.C. §605 ..... 10, 11, 12, 13, 15 *passim*

Miscellaneous

3 Criminal Law Reporter 4055 ..... 8, 20
96 L. ed. 194 45

IN THE

Supreme Court of the United States

October Term, 1967

No.

CARL I. COHEN,

Petitioner,

—v.—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner, Carl I. Cohen, prays that a writ of certiorari issue to review the order or judgment entered in this case by the Court of Appeals of the State of New York on April 18, 1968, hereinafter described.

Opinions Below

Preliminary Explanation: This petition for certiorari arises upon an order or judgment of the Court below which was rendered after reargument had been granted by that Court. Recitals are therefore needed herein concerning "Opinions Below" which preceded the latter decision on reargument.

* * * * *

The Court of Appeals of the State of New York did not write an opinion either upon granting the motion (by the within petitioner) for reargument, or in rendering its

decision of April 18, 1968, after reargument in which that Court adjudged that its original decision of July 7, 1966 be adhered to. There is not yet any official report of the decision (without opinion) of April 18, 1968; a copy of that decision is printed in Appendix A hereto *infra*; that decision contains a short dissenting memorandum by Honorable Chief Judge Stanley H. Fuld. That Court also did not write an opinion in rendering its original decision of July 8, 1966 (which has now been adhered to by that Court after reargument); two Judges of that Court (the then Chief Judge Desmond and the then Associate Judge Fuld) dissented from the decision of July 8, 1966 in an opinion which is printed in Appendix B hereto, *infra*, as part of the "memorandum" report of the decision of the Court of Appeals, reported in 18 N.Y. 2d 650. The opinion of the Appellate Division, Second Department, Supreme Court of New York, is reported in 24 A.D. 2d 900, 264 N.Y.S. 2d 886, and is printed in Appendix C hereto, *infra*. The opinion of the Supreme Court of New York, Kings County (Rinaldi, J.), is reported in 42 Misc. 2d 403, 248 N.Y.S. 2d 339, and is printed in Appendix D hereto, *infra*.

Jurisdiction

The judgment or order of the Court of Appeals of the State of New York sought to be reviewed is dated April 18, 1968 (Appendix A hereto *infra*; the remittitur on said judgment or order consists of a typewritten entry supplementing a prior remittitur on the original decision of the Court of Appeals dated July 7, 1966, and this remittitur item with the supplemental typewritten entry is printed in Appendix AA hereto, *infra*). The aforesaid judgment or order of April 18, 1968 adjudged that the original decision

of the Court of Appeals rendered July 7, 1966 in this case be adhered to after the granting of a motion by the within petitioner for reargument, and after such reargument had been held on full briefs and oral argument on the merits.

The aforesaid judgment or order of the same Court dated July 7, 1966 which was adhered to by the aforesaid judgment or order of April 18, 1968, after reargument, had affirmed, after full appeal on the merits, an order of an intermediate appellate court of the State of New York, the Appellate Division of the Supreme Court, Second Department, entered November 29, 1965, which in turn had affirmed with modification an evidence-suppression order granted by the Supreme Court of the State of New York, Kings County (Rinaldi, J.) on motion of the witihn petitioner who had sought such suppression of evidence (pretrial) in a prosecution for abortion. The pretrial suppression order by Justice Rinaldi vacated an ex parte wiretap order and directed the suppression of evidence procured by such wiretap together with evidence secured by unlawful search and seizure. The above-mentioned appeals resulted in modification of Justic Rinaldi's suppression order by reversing the portion of that order which had vacated the ex parte wiretap order and had suppressed the wiretap evidence; the appeals affirmed the suppression of the search-obtained evidence.

Thus, the judgment or order now sought to be reviewed—being, again, the decision of April 18, 1968 after full reargument in the Court below—brings before this Court on a *de novo* basis for the purposes of certiorari jurisdiction, the issues of this case relating to the wiretapping and the physical search. This *de novo* certiorari-jurisdictional posture of the case needs to be noted for the particular reason

that this case was previously before this Court on a petition for certiorari (October Term, 1966, No. 614, *Cohen* v. *New York*, cert. denied 385 U.S. 976, "for want of a final judgment", reh. denied 385 U.S. 1032) which sought review of the original final decision of the Court below dated July 7, 1966, the latter decision being the one which has now been adhered to by the Court below in its decision of April 18, 1968 here sought to be reviewed.

In view of the fact that the denial of our aforesaid October Term 1966 petition for certiorari (No. 614, 385 U.S. 976) was "for want of a final judgment", we realize that it is necessary for us to address ourselves in this statement of "Jurisdiction" in this new petition for certiorari, to the problem of "finality", since, again, the record posture on which we are now back before this Court is that of an effort by a certiorari petitioner to obtain *de novo* certiorari consideration in a case in which certiorari has previously been denied and in which the occasion for renewal of the certiorari application is that there has intervened a full reargument procedure on the merits in the Court below resulting in an adherence by the Court below to its original position (as to which certiorari had previously been denied).

In thus addressing ourselves to this certiorari-jurisdiction question of finality of the decision sought to be reviewed, we would respectfully commence by quoting the following portion of our statement of "Jurisdiction" appearing at pp. 2-4 of our previous petition for certiorari (No. 614, October Term 1966, *supra*)*:

---

* The previous petition for certiorari above mentioned is printed as Appendix SA in the separately bound Supplemental Appendix filed herewith. That Appendix SA as contained in our within Supplemental Appendix omits certain appendices which were originally included in it as filed at the October 1966 Term (appendices A, B, C, D, and J), because these same items now need to be printed in the Appendices to the present petition, *infra*.

"Under the New York State statutory procedure for motion-to-suppress proceedings of the above-mentioned type (N.Y. Code Crim. Proc. §§ 813-c et seq.), the State (the People) is not permitted to pursue the State statutory avenue for review of an order of suppression (such as had here been granted by Justice Rinaldi) without first filing a formal statement asserting that the deprivation of the use as evidence of the items suppressed makes it impossible in law or effectively destroys any reasonable possibility in fact to carry forward the criminal prosecution involved to a conviction (*id.*, § 518-a). The State filed such a statement in this case as a condition of being permitted to appeal to the Appellate Division from Justice Rinaldi's order of suppression. We submit that, by reason of the statute last cited and the filing by the State of the statutorily required statement just mentioned, it is to be taken that under the law of the State of New York the suppression order of Justice Rinaldi was the equivalent of a final and not merely an interlocutory order in the within proceedings, i.e., Justice Rinaldi's suppression order, under the operation of the law and practice of the State of New York in the manner above-mentioned, was the legal or jurisdictional equivalent of an order dismissing the indictment or indictments involved.

In the appeal taken by the State to the Appellate Division, to review Justice Rinaldi's order of suppression, the partial modification ordered by the Appellate Division had the result of rendering the indictments no longer necessarily impossible to prosecute to a conviction. The petitioner herein then appealed to the Court of Appeals of the State of New York, which affirmed the order of the Appellate Division, i.e., under the judgment or order of the Court of Appeals it is likewise no longer necessarily impossible for the State to prosecute the indictments forward to a conviction.

> It is thus true that the judgment or order of the Court of Appeals here sought to be reviewed does not finally dispose of the subject matter, i.e., it does not finally dispose of the criminal prosecution under the indictments involved. But it is believed that this is not the test of "finality" for the purpose of this Court's certiorari jurisdiction in the present instance. Justice Rinaldi's order of suppression did produce a result of finality in view of the New York legislation and practice previously referred to (Code Crim. Proc. §518-a), and it would not seem that the subsequent appellate modifications which revived a practical possibility of continuing the prosecution under the indictments can alter the legal or jurisdictional significance of the fact that petitioner did at one stage have what amounted to a final judgment in his favor (Justice Rinaldi's suppression order), and that now the highest State appellate court has rendered a final judgment depriving petitioner of the benefits of the lower Court's final judgment which, if it had not been modified on appeal, would have terminated the criminal prosecution."

The item just quoted from our 1966 Term petition for certiorari is now hereby adopted by petitioner and made part of our within presentation on his behalf on the question of satisfying the requisites of "finality" for purposes of certiorari jurisdiction.

In addition we submit, on this question of "finality", the following:—

As more fully recited *infra* (in our "Statement Of The Case"), our motion for reargument in the Court below which resulted in the granting of reargument and then in the rendering of the decision of April 18, 1968 here sought to be reviewed, was on the ground that *Berger* v. *New York*,

388 U.S. 41, decided subsequent to the original decision of the Court below on July 7, 1966, had the necessary effect of voiding *ex parte* Court orders authorizing telephone wire-tapping under *N.Y. Code Crim. Proc.* §813-a, including the wiretap order at issue in this case. (The latter motion for reargument in the Court below is in the certified record filed herewith, and it is printed as Appendix SB in the Supplemental Appendix filed herewith.) The latter motion for reargument had been filed in September 1967. While that motion for reargument was pending in the Court below, this Court, on December 8, 1967, decided *Katz* v. *United States*, October Term 1967, No. 35. Then, on December 29, 1967 the Court below granted our motion for reargument. Thereupon, in our brief on the merits in the Court below on the reargument we urged that the *Katz* decision had strongly fortified our contention (which we had previously based, in our motion for reargument below as aforesaid, solely on this Court's decision in *Berger*) that State telephone wiretapping is subject to the Fourth Amendment. (A copy of "Appellant's Brief On Reargument" in the Court below is printed as Appendix SC in the Supplemental Appendix filed herewith.) Also, in that brief of ours on the merits on the reargument in the Court below we argued that the rulings of this Court in both *Katz* and *Berger* are retroactively applicable to our case. However, as stated, the Court below on April 18, 1968 rendered a decision, without opinion, stating that "upon reargument [it] did * * * adjudge that the original decision of July 7, 1966, be adhered to" (Appendix AA hereto, *infra*).

To the extent that the decision of the Court below here sought to be reviewed (the decision of April 18, 1968 on reargument) represents or may represent a ruling that

Katz and *Berger* are not retroactive—which is the likely meaning of the decision below in view of the same Court's decision in *People* v. *Kaiser,* 21 N.Y. 2d 86, certiorari granted April 22, 1968, No. 1451 Misc.—the decision of the Court below herein creates a situation of altogether possible future severe injustice to the present petitioner, in a manner which may be pertinent to the question of this Court's jurisdiction of the present petition for certiorari. This case, which has not yet been brought to trial on the indictments but has gone through plenary state proceedings on petitioner's motions for suppression of wiretap evidence and physical-search evidence, would quite predictably be dismissed by the State Courts (indeed would be abandoned by the prosecution as noted *supra*) if the wiretap evidence is held inadmissible; particularly, that result would come about if the *Berger-Katz* rulings are eventually held applicable to state telephone wiretapping on a retroactive basis for cases pending in direct prosecutive proceedings or direct review proceedings. In two cases now pending in this Court, and perhaps in a third one, these issues are likely to be settled in the relatively near future. *Lee* v. *Florida,* No. 174, October Term 1967, argued on the merits in this Court on May 2, 1968, involves state telephone wiretapping or interception (See 3 *Criminal Law Reporter* 4055). *Kaiser* v. *New York,* No. 1451 Misc., October Term 1967, certiorari granted April 22, 1968 as above noted, involves the same New York State telephone wiretapping legislation which is involved in the instant case, plus the issue of retroactivity of *Berger-Katz* as above mentioned. *Desist* v. *United States,* No. 909, October Term 1967, certiorari granted March 4, 1968, involves the question of retroactivity of *Katz* as applied to the nontrespassory type of electronic room-

bugging. The series of decisions in this Court on the question of retroactivity *versus* prospectivity, from *Linkletter* v. *Walker*, 381 U.S. 618 to *Stovall* v. *Denno*, 388 U.S. 293,* appear to have given favor to retroactivity only on a closely selective case-by-case basis in which it has moreover appeared to be all but *de rigueur* that a case which is given the retroactive benefit of an overruling decision shall be a case which was pending on direct review at the time of the overruling decision.** Accordingly, it is important for the present petitioner Cohen to attempt to place his case in the status of being a case which, if possible, shall be pending on direct review in this Court at the time when the Court may render its decisions on the merits in the *Kaiser* or *Lee* cases, or in the *Desist* case.

We hasten to say that we are not overlooking for one moment that this Court has already once declined to find finality in the present case (385 U.S. 976). Our thought is that the Court may now be disposed to reconsider its previous view of "want of a final judgment" in this case, either on the basis of the presentation on this issue in our previous petition for certiorari as quoted at pp. 5-6, *supra*, or on the basis of the additional considerations of justice here being suggested in relation to the retroactivity problem. Those considerations of justice include factors in addition to the ones above mentioned. This case of petitioner Cohen has witnessed since 1962 the most diligent kind of continuous pressing by defense counsel of the issue of wiretap un-

---

* See also *Tehan* v. *Shott*, 382 U.S. 406 and *Johnson* v. *New Jersey*, 384 U.S. 719.

** See the extensive discussion of these recent retroactivity-prospectivity decisions in the joint brief for petitioners (on the merits), pp. 52-89, in *Desist* v. *United States*, No. 909, October Term 1967. We adopt that discussion here as being virtually in all respects pertinent to the retroactivity questions in our case.

constitutionality. Indeed this case was the vehicle through which it was first established in New York State that there is a right to move pre-trial for suppression of wiretap evidence (Appendix D hereto, *infra*). It would be a peculiarly painful injustice, should State telephone wiretapping at last be definitely outlawed by this Court in the relatively near future, for the present petitioner Dr. Cohen to be deprived of the benefit of such a decision through some vagary of litigational chronology which might be avoidable by a favorable reconsideration at this juncture of the problem of the certiorari jurisdiction.* Should this Court be disposed to reconsider that problem in this case, we would further respectfully suggest that the Court's powers under the "All Writs" Act (28 U.S.C. §1651) may be found applicable for the assertion, or for an interim preservation, of the Court's jurisdiction to review this case.

In concluding this statement as to jurisdiction, we add the following formal particulars:—

The jurisdiction of this Court is invoked on all of the grounds above set forth, and under 28 U.S.C. §1257(3), since the petitioner is claiming rights, privileges or immunities under the Fourth Amendment (unreasonable search and seizure), the Fifth Amendment (self incrimination) and the Fourteenth Amendment (due process of law) of the Constitution of the United States, and under 47 U.S.C. §605; and since there is necessarily drawn in question the validity of a State statute (N.Y. Code Crim. Proc. §813(a))

---

* Cf. *Stovall* v. *Denno*, 388 U.S. 293, 301, where the Court mentioned that one important factor in favor of allowing retroactivity of an overruling decision is "the possible effect upon incentive of counsel to advance contentions requiring a change in the law" (citing scholarly commentators).

on the ground of its being repugnant to the Constitution of the United States, and to 47 U.S.C. §605 as given supremacy by Article VI of the Constitution of the United States.

Questions Presented

1. Does either *Berger* v. *New York*, 388 U.S. 41, or *Katz* v. *United States*, U. S. , 19 L. Ed. 2d 576, No. 35, October Term 1967, or do both of those decisions, make State telephone wiretapping in State criminal prosecutions subject to the Fourth Amendment? And, if so, must the wiretap evidence in this case be suppressed?

2. Is the answering of Question 1, above, affected by considerations of retroactivity *versus* prospectivity? Should not *Berger*, or *Katz*, or both, be held applicable to this case either on a principle of retroactivity, or on the ground that this case has not yet been brought to trial on the indictments, the proceedings herein thus far having occurred in connection with pretrial motions to suppress evidence? (Not argued in this petition; the argument in the Joint Brief for Petitioner, pp. 52-89, in *Desist* v. *United States*, No. 909, this Term, cert. granted March 4, 1968, is adopted herein.)

3. In view of the circumstances set forth in our statement as to "Jurisdiction", *supra*, is not this Court's certiorari jurisdiction available, or is not alternatively or also its jurisdiction and power under the "All Writs" Act (28 U.S.C. §1651) available, to afford to the present petitioner *via* this petition for certiorari constitutional relief with respect to the wiretap evidence?

4. Supplementing Question 1, above, is the wiretap evidence herein involved unconstitutional under the *Berger*

decision (*supra*) standing alone as having invalidated New York State's permissive wiretap legislation (N.Y. Code Crim. Proc. §813-a) as unconstitutional on its face; or does the *Katz* decision (*supra*) effect a gloss on *Berger* so as to call for disposition of this case on a particular and selective application of Fourth Amendment tests, rather than on the *Berger* basis of statutory unconstitutionality on its face?

5. Supplementing all of the above questions which are cast in terms of the Fourth Amendment, is the New York State permissive wiretap legislation (N.Y. Code Crim. Proc. §813-a), or is the wiretap evidence in this case, unconstitutional under the Supremacy Clause of Article VI of the United States Constitution by reason of conflict with 47 U.S.C. §605?

6. Supplementing Question 5 above, can any State statutorily permitted telephone wiretapping be constitutional under the Fourth and Fifth Amendments and 47 U.S.C. §605?

7. Where State Courts in an abortion prosecution have voided a search of a physician's office on Fourth Amendment grounds and have ordered the product of the search suppressed for use as evidence in the abortion prosecution; and where the local police prior to the search had maintained at the same office premises a telephone wiretap authorized by ex parte Court order under permissive State wiretap legislation; and where the police claim to have lost or discarded important records taken in the search which would have disclosed which sources of evidence (names of female patients of the physician) for use at the abortion trial came from the voided search and which came from the wiretap; and where the State Court of first instance which

conducted the hearing on the motion to suppress the product of the search and the wiretap has ordered suppression of both such products on the ground *inter alia* that the evidentiary sources obtained from the voided search and from the wiretap were inextricably interwoven or intermingled; and where the State appellate courts in reviewing the suppression order have not ruled on the latter issue of intermingling, have agreed that the search was bad, but have held that the wiretap was lawful—does vindication of the Fourth Amendment rights acknowledgedly violated by the *search* require suppression also of the intermingled *wiretap*-obtained evidence, lest otherwise, in the particular circumstances presented, the Fourth Amendment rights be indirectly but effectively prejudiced?

8. Assuming that the New York State permissive wiretap legislation (N.Y. Code Crim. Proc. §813-a) which allows what we may term "searches" in the form of wiretap upon a showing of "reasonable grounds" is not in conflict with any Federal constitutional or statutory provision, and treating the "reasonable grounds" provision of the State statute as equivalent to Fourth Amendment "probable cause" (evidently so construed by the State Courts), were the police affidavits used to obtain the ex parte wiretap order in this case adequate by Fourth Amendment standards in view of failure to establish reliability of the informer, among other Fourth Amendment defects?

9. Did the overall conduct of the police in investigating the alleged abortion activities of petitioner—which police conduct included an egregiously high-handed and admittedly unconstitutional search, massive wiretapping for which ex parte State judicial permission was obtained on the basis of information from basely discreditable and

favor-seeking-motivated informers whose information was moreover almost all hearsay, loss and spoliation of essential records seized in the unlawful search, manifestly unconvincing police testimony at the suppression hearing to the effect that the wiretap rather than the search produced the essential leads for the abortion prosecution, and brutally coerced subjection of a main female prosecution witness to compulsory gynecological examination in the immediate aftermath of her alleged abortion by petitioner as she was arrested on leaving petitioner's office (the lady in question moreover having denied she was aborted and the hospital report being negative for abortion)—fall below Fourth and Fourteenth Amendment standards for the investigation and prosecution of crime?

Constitutional and Statutory Provisions Involved

The case involves Article VI (supremacy clause), and the Fourth (unreasonable search and seizure), Fifth (self-incrimination), and Fourteenth (due process of law) Amendments of the United States Constitution. It also involves §605 of the Federal Communications Act (U.S.C. Title 47). It also involves the following New York State statutes: N.Y. Code Crim. Proc. §518-a, §§813-a, 813-c, 813-d and 813-e. These Federal and State statutory provisions are quoted in Appendix E hereto, *infra*.

Statement of the Case and of How the Federal Questions Are Presented

Petitioner, a licensed physician of the State of New York, was indicted in 1960 for abortion (R. 7-20).* He moved in the Supreme Court of New York, Kings County, to suppress the use as evidence of products of a search of his home and office conducted during the middle of the night of September 2-3, 1960, and the products of a telephone wiretap of his office conducted for some months prior thereto under the authority of an ex parte Court order issued pursuant to N.Y. Code Crim. Proc. §813-a (R. 21). After extensive hearings (R. 63-556), the motion to suppress was granted, on the grounds *inter alia* that the search violated the Fourth Amendment, the wiretap permissive order was based on affidavits which were inadequate under the "reasonable grounds" requirement of the statute, and the evidentiary products (especially the names of female patients of petitioner) of the search and the wiretap were so inextricably intermingled or interwoven that it was necessary to suppress the use of the testimony of all of the female complaining witnesses named in the indictments; in this last connection the Supreme Court, Kings County (Rinaldi, J.), also noted that the police had lost, misplaced and destroyed records obtained in the search which were indispensable for determining which evidentiary sources came from the search and which from the wiretap, and it strongly disparaged the probativeness of the police testimony on this subject (R. 563-571; Appendix D hereto, *infra*).

---

* "R. " refers to the printed Record On Appeal in the Court below, nine extra copies of which were filed in this Court in No. 614, Oct. Term 1966.

The New York State statutes permit appeal by the State (the People) from an order of suppression of the instant type if the State files with the Appellate Court a statement asserting that, if the State is deprived of the use of the suppressed evidence, the prosecution cannot be carried forward to a conviction (N.Y. Code Crim. Proc. §518-a). The State filed such a statement in this case as a condition of the right to appeal to the Appellate Division, Second Department, Supreme Court of New York.

The Appellate Division, in the appeal by the State from the order of suppression, approved the lower Court's (Rinaldi, J.) invalidation of the search; it disapproved Justice Rinaldi's determination that the wiretap affidavits were insufficient, but, be it noted, this ruling of the Appellate Division was stated in only conclusory words; it deleted Justice Rinaldi's order of restraint or suppression as to the use of the names of the females mentioned in the indictments, but it did so without (so far as appears) considering the issue of whether those names came from the wiretap, or from the search, or interminglingly from both the wiretap and the search; it did not reach the issue of loss or spoliation of documents by the police; it also did not reach the issue of the overall police conduct in relation to the search and the wiretap taken together; and it did not reach any constitutional issue of wiretapping, i.e., either as regards the constitutionality of Code Crim. Proc. §813-a in itself, or as to the constitutionality of *any* form of State legislation for permissive wiretapping by ex parte Court order (R. 576-579; Appendix C hereto, *infra*).

Petitioner appealed, by leave, to the Court of Appeals of the State of New York (R. 573-575), from the order of the Appellate Division (R. 576-577). The Court of Appeals

affirmed (July 7, 1966) the order of the Appellate Division without opinion (Appendices A and B hereto, *infra*). Judge Fuld of the Court of Appeals dissented, in the following memorandum in which Chief Judge Desmond concurred (Appendix B hereto, *infra*):

> "I adhere to the views I expressed in People v. Dinan (11 NY 2d 350, 357)—that evidence should be excluded if obtained by interception of telephone communications in contravention of the Federal Communications Act and, accordingly, vote to reverse and to order a new trial."

After the above mentioned affirmance by the Court of Appeals (with dissenting opinion by Judge Fuld, concurred in by Chief Judge Desmond) (July 7, 1966) the present petitioner was denied certiorari for review of that judgment, "for want of a final judgment" (385 U.S. 976).

Thereafter, this Court meanwhile having decided *Berger* v. *New York,* 388 U.S. 41, the present petitioner moved for reargument in the Court below as recited in our statement as to "Jurisdiction", *supra*—on the ground that *Berger* had the necessary effect of voiding *ex parte* court orders authorizing telephone wiretapping under *N.Y. Code Crim. Proc.* §813-a, including the wiretap order at issue in the present case; a copy of that motion for reargument is printed as Appendix SB in our Supplemental Appendix filed herewith.

The Court below granted the motion for reargument on December 29, 1967, this Court meanwhile having decided *Katz* v. *United States, supra,* on December 18, 1967.

After full briefing on the merits, and oral argument, the Court below decided the reargument in this case, on April

18, 1968, without opinion, stating, "Ordered and adjudged, upon reargument, that the original decision of this Court dated July 7, 1966 be and the same hereby is adhered to" (Appendix A hereto, *infra*). Chief Judge Stanley H. Fuld of the Court below dissented and voted to reverse in the following memorandum (*ibid*):

> "Until the United States Supreme Court has definitively passed on the question here presented, I adhere to the views which I expressed in my dissenting memorandum on the appeal proper herein (18 NY2d 650) and in my dissenting opinion in People v. Kaiser (21 NY2d 86, 104)." *

The printed "Appellant's Brief On Reargument" in the Court below is reproduced as Appendix SC in our Supplemental Appendix filed herewith; this item is set forth in our Supplemental Appendix in order that the Court may be informed of how the Federal questions herein are presented on the basis of our presentation in the reargument in the Court below.

Throughout the proceedings below the Federal questions were duly preserved by petitioner; as seen from our recitals, *supra*, those questions were necessarily passed upon or decided in each of the three State Courts below. See also Appendix SA in our Supplemental Appendix filed herewith; that Appendix SA is our petition for certiorari in No. 614, Oct. Term 1966, wherein the appendices include a showing of the preservation of the federal questions (Appendices, E, F, G, H and I in Appendix SA contained in the Supplemental Appendix filed herewith).

---

* The dissenting memorandum "on the appeal proper herein" referred to in the above quotation appears in Appendix B hereto, *infra*. Chief Judge Fuld's dissenting opinion in *People* v. *Kaiser*, referred to in the above quotation, is before this Court in the certiorari papers in the *Kaiser* case, cert. granted April 22, 1968, No. 1451 Misc., October Term 1967.

Reasons for Granting the Writ

I

[Questions Presented No.'s 1, 2, 3, 4, 5, 6]

The dissenting opinion in this case written by the then Judge Fuld of the Court of Appeals on the original argument, concurred in by the then Chief Judge Desmond (Appendix B hereto, *infra*), favored a disposition on the basis of outright constitutional invalidation of all State telephone wiretapping in obedience to § 605 of the Federal Communications Act (47 U.S.C.). By the time the reargument stage in this case had been reached in the Court below —the present certiorari application being addressed to the decision of the Court below on that reargument—the decisions of this Court had apparently expanded the framework of the issue of Federal validity of State telephone wiretapping beyond the area of the Federal Communications Act and into the area of the Fourth Amendment. We refer to the *Berger* and *Katz* decisions; and to save space in the pages proper of this petition, we respectfully refer the Court to our Appendices SB and SC contained in our Supplemental Appendix filed herewith, being, respectively, our motion for reargument and our brief on reargument in the Court below, in which latter papers we argued in detail the applicability of *Berger* and *Katz* to State telephone wiretapping.

The dissenting memorandum of Chief Judge Fuld in the decision below on the reargument practically in so many words invites a ruling by this Court "definitively" passing on "the question here presented" (Appendix A hereto, *infra*).

Debate over just what this Court's present stand is as to the constitutionality of State telephone wiretapping in the light of *Berger* and *Katz* may be expected to be settled soon —when the Court decides *Lee* v. *Florida,* No. 174 this Term, and *Kaiser* v. *New York,* certiorari granted April 22, 1968, No. 1451 Misc. this Term. If certiorari is granted in our case on the present petition, we may perhaps expectedly be scheduled by the Court for argument together with *Kaiser* at the next Term.

That State telephone wiretapping should be held subject to the Fourth Amendment and to 47 U.S.C. §605 is a proposition to which the present petitioner hopes, of course, that this Court would soon be giving explicit voice at last by way of outright holding. In view of this Court's own continuing alertness to the problem of the conflict between cases such as *People* v. *Dinan,* 11 N.Y. 2d 350 and *Benanti* v. *United States,* 355 U.S. 96 we shall refrain from burdening the Court with further argument in support of the suggestion that this case affords a proper occasion for re-examining the Federal constitutionality of State wiretapping under the tests of the Fourth Amendment and of §605 of the Communications Act (supremacy clause). We would add only that, again, both the *Berger* and *Katz* decisions, and the granting of certiorari in *Lee* and *Kaiser,* at the very least point strongly to the conclusion that this Court has already (in *Berger* and *Katz*) sounded the constitutional condemnation of State telephone wiretapping when done in violation of the Fourth Amendment. And to one who reads the description in *3 Criminal Law Reporter* 4055-4058 of the oral argument in this Court on May 2, 1968 in *Lee* v. *Florida, supra,* the fact which emerges with perhaps greatest interest is that both the parties and the Justices seemed to

take it for granted that *Katz* had already outlawed State telephone wiretapping at least as a general constitutional proposition, unless such wiretapping complies with the Fourth Amendment.

II

[Question Presented No. 7]

All three of the Courts below were evidently in agreement that the physical search at Dr. Cohen's home and office on the night of September 2-3, 1960, violated the Fourth Amendment. Since no guidance or expression was offered by the Appellate Division or by the Court of Appeals to deal with the problem of the express finding and ruling by the Supreme Court, Kings County, concerning the intermingled character of the evidentiary products of the search and the wiretap,* the modification on appeal which leaves the State free to use the evidence of the female complaining witnesses stands in this record not merely as a ruling by the State appellate courts below that the wiretap-obtained evidence may be used, but also it is susceptible of being applied (erroneously, we contend) as an effective ruling by the latter Courts that such wiretap evidence may be used irrespective of the consequences that this may work in the way of allowing use at the trial of concededly unconstitutionally obtained *search* evidence.

The exhaustive proceedings before the Supreme Court, Kings County, in the hearing on the motion to suppress, were so complete (R. 63-556) as to afford little if any

---

* As noted, so far as appears the unconstitutional search was the source of the entirety of the evidentiary leads to the names of Dr. Cohen's female patients.

realistic expectation that there will ever be judicially unraveled in this case the interweaving of the search-obtained evidence and evidentiary leads as distinct from those obtained through the wiretap.

This case presents, therefore, in an unusual (but likewise unusually compelling) way a problem as to the effective preservation of undisputedly applicable Fourth Amendment sanctions. By a process of amorphous absorption of the undisputedly unconstitutional search products into the allegedly legal wiretap products, the admittedly proper and necessary constitutional quarantine against the search products in this case is sure to be breached.

Nor is it to be thought that the present case may be rare or even unusual in these last mentioned respects. It is virtually standard operating procedure for police to follow up a wiretap or electronic eavesdrop with a search and seizure where prosecution is contemplated. The intriguing procedural device implicit in the not-too-coherent but impingingly predictable rulings of the State appellate courts in this case, a device whereby unconstitutional Fourth Amendment searches are to be "rehabilitated" by "constitutional" State wiretaps, should receive the attention of this Court, the present case being a suitable vehicle for this purpose through the granting of certiorari.

III

[Question Presented No. 8]

The Supreme Court, Kings County (Rinaldi, J.), specified in an impressively detailed manner (*infra*) the defectiveness of the wiretap affidavits under the Fourth Amendment test of "probable cause" * (R. 564-568; Appendix D hereto, *infra*). The Appellate Division ruled otherwise, but without any explanation or statement of reasons (R. 576-579; Appendix C hereto, *infra*); and the Court of Appeals likewise (writing no opinion) did not explain why it affirmed the order of the Appellate Division (Appendices A and B hereto, *infra*).

The ex parte wiretap order, application and supporting affidavits appear at R. 21-29. The wiretap order was issued on affidavits by Assistant District Attorney Kenneth J. McCabe and two informants, Alvin G. Rosen and Audrey Saltzman. Let us begin by summarizing Justice Rinaldi's detailed analysis of those affidavits (it being remembered, again, that the Appellate Division and the Court of Appeals in reversing Justice Rinaldi on this issue gave no reasons for so doing).

Justice Rinaldi noted (R. 565-568) that Rosen and Saltzman were under investigation in connection with certain forgery, burglary and arson charges which in no way involved Dr. Cohen; that in the course of the investigation Rosen, "in an obvious attempt to curry favor with the police", volunteered to them that Dr. Cohen was committing abortions; that Rosen's information (described,

---

* The "reasonable grounds" provision of *N.Y. Code Crim. Proc.* §813-a is undisputedly the equivalent of "probable cause," and it has been so treated in this litigation. Cf. *Draper* v. *United States*, 358 U.S. 307, 310 fn. 1.

infra) used in the supporting affidavits for the wiretap order resulted in supporting affidavits "based to a great extent on hearsay twice removed and on events which had transpired a long time prior thereto"; that "There is also a serious question" as to the sufficiency of the previous police dealings with Rosen such as would justify the police in depending upon the reliability of his information; that the question of informer reliability is "of paramount importance" and facts must be brought to the attention of the Court to whom ex parte application was made to satisfy it of such reliability; that Rosen and Saltzman "were themselves deeply enmeshed" in a major criminal ring and while they had accurately confessed their own crimes and those of their accomplices in which they had already been implicated, they had never previously informed the police as to any crimes in which they themselves were not implicated; that "the police had no criteria to judge their reliability concerning information as to this defendant" and "Vouching as to their reliability had no basis in fact"; that the authorities impose "strict standards of reliability of informers"; that although these authorities involve search and seizure situations, "the same standards, at the least, must be applied to wiretap orders"; and that "The Court cannot find anything in the original wiretap affidavits which meet [sic] the foregoing tests as to * * * 'reasonable grounds' and 'reputation for reliability' ".

The above summarized factual findings of Mr. Justice Rinaldi are fully supported by the record. Thus:-

(1) As above noted the application for the ex parte order consisted of an affidavit by Assistant District Attorney Kenneth J. McCabe and two informants, Alvin G. Rosen and Audrey Saltzman. The application was made on July 28, 1960, the order was granted the same day, and

the wiretapping was done from July 29 to September 2, 1960 on Dr. Cohen's office telephone, *a period of 36 days.* (R. 21-29, 563).

(2) The McCabe affidavit (R. 23-25) contained all of the allegedly material information, the affidavits of the informers Rosen and Saltzman having been merely conclusory confirmations of Mr. McCabe's affidavit (R. 26-29), and stating that the information given by each of the informers to the police was their own "experience" and from conversation Audrey Saltzman allegedly had with one Irma Wertheimer. The McCabe affidavit averred that it was made upon *information and belief* and upon the annexed affidavits of Rosen and Saltzman, and that the sources of the information and the grounds of the belief were those *"annexed affidavits, the records and files of his office and information supplied to deponent by the detective's squad attached to the office of the District Attorney, Kings County"* (Emphasis added).

(3) The terms of the ex parte wiretap *order* itself (R. 21), as distinct from the application or affidavits, authorized tapping "of any and all telephone communications made to and from" Dr. Cohen's office telephone. Thus, the order did not specify or discriminate in any way as to which conversations might be "seized", but allowed a blanket "seizure" of any and all conversations on the telephone in Dr. Cohen's office. Nor, did the order refer to any specific alleged abortion as to which seizure of telephone conversation should be authorized and confined; there is not the slightest intimation in the order or the affidavit that any conversation at all would take place concerning past or presently being committed abortions. Nor, since (*infra*)

there had been no verbal testimony supplementing the application, can the order be construed as having constructively incorporated any limitation or specification derivable from any such verbal testimony.

(4) The scope and manner of *execution* of the actual carrying out of the wiretapping was a continuous performance from July 29 to September 2, 1960. The wiretapping was not only continuous, it was indiscriminate, saturational, literally total, in its dragnet "search and seizure" of incoming and outgoing telephone calls on petitioner's office telephone for a period of about five weeks. Some idea of the indiscriminate and total nature of this eavesdropping may be had from the District Attorney's statements, while resisting our demand for the production of the taped conversations, that the tapes had "relation to matters completely unrelated to this case" (R. 69), "this investigation went well and beyond just the eight women who are named in these indictments • • • certain information was obtained relevant to other persons but they are persons whose cases will not be before the Court" (R. 75), "the tremendous volume of telephone conversations that took place just over the wire from the doctor's office phone would require approximately six months to transcribe" (R. 77), "there are about forty records. Each one would take two hours to hear" (R. 77). And this prodigious, indiscriminate wiretapping took place, it will be remembered, on a telephone which carried, for the five weeks involved, innumerable confidential professional conversations between a physician and hundreds of his female patients, only a minute fraction of whom are alleged to have been the subject of "crime"—and those few only after the dragnet had operated for five weeks. In the light of decisions like

Osborn and *Katz* (see further discussion of those cases *infra*) which so meticulously point to utmost selectivity and discreet limitation as necessary to justify electronic "search and seizure" of conversation, the wiretapping in the present case is practically a laboratory example of what this Court inferentially condemned in those cases by enunciating the standards of constitutional acceptability illustrated by the facts of those cases.

(5) The affidavits were the only showing made before the Judge in applying for the wiretap order. No supplemental or confirmatory verbal proof was submitted to the issuing Judge. At least, if there was any such, there was no record made thereof.

(6) The "information" recited in the McCabe affidavit was that Irma Wertheimer in July or August of 1958 (two years before the wiretap order was sought) being pregnant, "obtained information" that a criminal abortion could be performed upon her by the within Dr. Cohen; that shortly thereafter she went to Dr. Cohen's office with her husband Milton Wertheimer and had an abortion done for $500; that in July or August of 1959 Irma Wertheimer, being again pregnant, this time from intercourse with her boyfriend Constantine Triges, she and Triges went to Dr. Cohen's office where they paid him $400. for performing an abortion; that again in October or November 1959 Irma and her boyfriend Triges went to Dr. Cohen's office where they paid him $400. for performing another abortion; that during the first week of February 1960 (6 months before the wiretap order was sought) Audrey Saltzman, believing herself pregnant, consulted with her girlfriend Irma Wertheimer regarding Dr. Cohen, Audrey and Alvin G. Rosen went to Dr. Cohen's office, Rosen had $750. with him, Dr.

Cohen examined Audrey and advised she was pregnant, he demanded $900. to perform an abortion, as Rosen only had $750. with him they left his office and Dr. Cohen did not perform an abortion because thereafter, they claim, Audrey's menstrual cycle came about naturally and they had no reason to return. No affidavit was obtained from Irma or Milton Wertheimer, or from Constantine Triges, and the affidavits do not contain one word that the Wertheimer information was verified by anyone.*

(7) The affidavits contain nothing concerning the reliability of Rosen and Saltzman as informers and the Judge who signed the wiretap order had no information from which he could determine their reliability.**

(8) The affidavits also show on their face that all of the alleged information concerning Irma Wertheimer was hearsay to Rosen and Saltzman and at least double hearsay to the police and the District Attorney. As for the item in the McCabe affidavit about Rosen's and Saltzman's own alleged visit to Dr. Cohen's office, this would scarcely rank as "reasonable grounds" since all that allegedly occurred was a conversation about an abortion, but no abortion. The police testimony in the suppression hearing before Mr. Justice Rinaldi revealed that the hearsay character of the affidavits was even more attenuated than appeared from the affidavits themselves because the police evidently got their whole story from Rosen rather than from his girlfriend Miss Saltzman,

---

* As a matter of fact, there is no indictment charge against the Doctor based on the alleged Wertheimer abortions, nor, surprisingly, the alleged Saltzman incident.

** *Draper* v. *United States*, 358 U.S. 307; *Jones* v. *United States*, 362 U.S. 257; *Henry* v. *United States*, 361 U.S. 98; *United States* v. *Ramirez*, 279 F. 2d 712, 715 (C.A. 2, 1960).

so that all of the alleged police information about Miss Saltzman's friend Irma Wertheimer (from whom no affidavit was obtained) came to them by *triple* hearsay (R. 119-132, 151-162, 241-247). Indeed, since Mr. McCabe in turn got his information from an unspecified police or detective source, or for all that appears, from *a chain* of such sources, the case is one *of at least quadruple* hearsay.

(9) Besides all of this, the alleged happenings mentioned in the McCabe affidavit long antedated the wiretap application which was made at the end of July 1960. The alleged Irma Wertheimer incidents were in the summer of 1958, the summer of 1959 and the fall of 1959, and the inconclusive alleged Saltzman-Rosen incident was six months prior to the wiretap application. Nevertheless, Mr. McCabe's affidavit, which was sworn to July 27, 1960, concluded that by reason of the aforesaid there was "reasonable cause to believe that evidence of the crime of criminal abortion may be obtained if telephone messages were to be intercepted" on Dr. Cohen's office telephone.*

(10) Nowhere in the application for the wiretap order was there any claim of exigency or of emergency need to tap Dr. Cohen's office telephone.

---

* It is fundamental, in the general law of search warrants, that this kind of stale allegations cannot support an application for a search warrant. Cf. the Federal decisions which deal with this staleness factor in connection with arrests and searches, e.g., *United States* v. *Joines*, 258 F. 2d 471 (C.A. 3 1958), cert. denied 358 U.S. 880; *Dailey* v. *United States*, 261 F. 2d 870 (C.A.5 1958), cert. denied 359 U.S. 969; *Carlo* v. *United States*, 286 F. 2d 841 (C.A. 2 1961); *Hobson* v. *United States*, 226 F. 2d 890 (C.A. 8, 1955); *Wrightson* v. *United States*, 222 F. 2d 556 (C.A.D.C. 1955); see also the dissenting opinion by Judge Waterman, collecting the authorities, in *DiBella* v. *United States*, 284 F. 2d 897 (C.A. 2 1960), reversed on other grounds 369 U.S. 121.

(11) Nor did the application define or discriminate or specify in any way what were the particular conversations to be eavesdropped (or "seized").

(12) Nor did the application contain anything whatever to support the contention either that evidence of any alleged past-committed abortion would be found, or that evidence of any current or "present" crime of abortion would be found—all of the allegations having related, as seen, to stale, long past alleged happenings.

We shall not here burden the Court with a recapitulation of the standards laid down in *Berger* concerning judicial warrants for electronic searches, because this Court restated the subject in its decision in *Katz*. We shall, however, quote the further elucidation of standards given in *Katz*—after which we shall describe also the Court's similar exposition in the *Osborn* case.

The following is quoted from *Katz* v. *United States* (19 L. Ed. 2d 576 at 583-584):

> "The question remaining for decision, then, is whether the search and seizure conducted in this case complied with constitutional standards. In that regard, the Government's position is that its agents acted in an entirely defensible manner: They did not begin their electronic surveillance until investigation of the petitioner's activities had established a strong probability that he was using the telephone in question to transmit gambling information to persons in other States, in violation of federal law. Moreover, the surveillance was limited, both in scope and in duration, to the specific purpose of establishing the contents of the petitioner's unlawful telephonic communications. The agents confined their surveillance to the brief periods during which he used

the telephone booth, and they took great care to overhear only the conversations of the petitioner himself.

Accepting this account of the Government's actions as accurate, it is clear that this surveillance was so narrowly circumscribed that a duly authorized magistrate, properly notified of the need for such investigation, specifically informed of the basis on which it was to proceed, and clearly apprised of the precise intrusion it would entail, could constitutionally have authorized, with appropriate safeguards, the very limited search and seizure that the Government asserts in fact took place. Only last Term we sustained the validity of such an authorization, holding that, under sufficiently 'precise and discriminate circumstances,' a federal court may empower government agents to employ a concealed electronic device 'for the narrow and particularized purpose of ascertaining the truth of the . . . allegations" of a 'detailed factual affidavit alleging the commission of a specific criminal offense.' *Osborn* v. *United States,* 385 U.S. 323, 329-330. Discussing that holding, the Court in *Berger* v. *New York,* 338 U. S. 41, said that 'the order authorizing the use of the electronic device' in *Osborn* 'afforded similar protections to those . . . of conventional warrants authorizing the seizure of tangible evidence.' Through those protections, 'no greater invasion of privacy was permitted than was necessary under the circumstances.' *Id.,* at 57. Here, too, a similar judicial order could have accommodated 'the legitimate needs of law enforcement' by authorizing the carefully limited use of electronic surveillance.

* * * * *

And bypassing a neutral predetermination of the *scope* of a search leaves individuals secure from Fourth Amendment violations only in the discretion of the police."

We note next the standards laid down in the *Osborn* case (*Osborn* v. *United States,* 385 U.S. 323). It will be recalled that in *Osborn* the Court dealt for the first time with an electronic auditing activity where prior judicial permission had been obtained.

For purposes of comparison (and distinction) with our case, the operative facts in *Osborn* were as follows:— On November 7, 1963 a man named Robert Vick had a conversation with Mr. Osborn in the latter's office, Osborn being an attorney for James R. Hoffa in a then pending criminal trial in the Federal Court in Nashville, Tennessee. In this conversation of November 7, 1963, which the parties continued in an adjacent alley outside Osborn's office, Vick and Osborn discussed bribing a prospective juror in the Hoffa trial. Immediately after this November 7 meeting with Osborn, Vick, who unbeknownst to Osborn had been operating as a Federal informer, reported the conversation to an agent of the United States Department of Justice. Vick was then requested to put his report in the form of a written statement under oath, which he did. The next day, November 8, this sworn statement of Vick was shown by Government attorneys to the two Judges of the Federal District Court, Chief Judge Miller and Judge Gray. After considering Vick's affidavit, the Judges agreed to authorize agents of the FBI to conceal a recorder on Vick's person to determine from recordings of further conversations between Vick and Osborn whether Vick's charges were true. When Vick went back to Osborn's office later that same day, November 8, the recording device did not work properly, and Vick made a written statement of what occurred during that meeting. The Government lawyers reported these circumstances to Chief Judge Miller, who then authorized that

the recorder be used again on November 11, under stringent instructions (duplicating the original instructions on the first occasion when Judges Miller and Gray had authorized the use of the recorder) that "the tape recorder should be used under proper surveillance, supervision, to see that it was not faked in any way, and to take every precaution to determine that it was used in a fair manner, so that we could get at the bottom of it and determine what the truth was" (385 U.S. at 329, fn. 6). Chief Judge Miller also stated, in explaining why he and Judge Gray had approved the use of the recorder, that, "The affidavit contained information which reflected seriously upon a member of the bar of this court, who had practiced in my court ever since I had been on the bench. I decided that some action had to be taken to determine whether this information was correct or whether it was false. It was the most serious problem that I have had to deal with since I have been on the bench. I could not sweep it under the rug" (385 U.S. at 329-330). Vick then went ahead and obtained the recording of a conversation of November 11, which indubitably inculpated Osborn.

In the *Osborn* decision, where the Justices who had concurred or dissented in *Lopez* v. *United States*, 373 U.S. 427 (except Mr. Justice Douglas who dissented in *Osborn*, and Mr. Justice Goldberg who had meanwhile resigned from this Court) joined, the Court, after describing the facts substantially as we have above set them forth, stated as follows (385 U.S. at 329-331) (Court's footnotes omitted):

> "The issue here, therefore, is not the permissibility of 'indiscriminate use of such devices in law enforcement,' but the permissibility of using such a device under the most precise and discriminate circumstances, circumstances which fully met the 're-

quirement of particularity' which the dissenting opinion in Lopez found necessary.

* * * * *

So it was that, in response to a detailed factual affidavit alleging the commission of a specific criminal offense directly and immediately affecting the administration of justice in the federal court, the judges of that court jointly authorized the use of a recording device for the narrow and particularized purpose of ascertaining the truth of the affidavit's allegations. As the district judges recognized, it was imperative to determine whether the integrity of their court was being undermined, and highly undesirable that this determination should hinge on the inconclusive outcome of a testimonial contest between the only two people in the world who knew the truth—one an informer, the other a lawyer of previous good repute. There could hardly be a clearer example of 'the procedure of antecedent justification before a magistrate that is central to the Fourth Amendment' as 'a precondition of lawful electronic surveillance.' "

Thus the Court in *Osborn* was apparently able to obtain a consensus which included some of the divergent Justices in the *Lopez* case.

The circumstances in *Osborn*—bearing no remote resemblance to the circumstances of our case—included the following:—The situation to which the proposed electronic search was addressed in Osborn was in the highest degree a specific and particularized situation, both as regards the specificity of the criminal charge and the altogether practical feasibility of confining the electronic search to words or conversation which in all likelihood were going

to relate exclusively to that specific criminal charge. Everything pointed to the fact that Vick was going to be meeting with Osborn on November 8, and then on November 11, specifically and solely for the purpose of carrying forward the specifically charged criminal project of bribing a juror in the *Hoffa* case. *Osborn* was in no sense, then, a situation in which the proposed electronic search for which advance judicial permission was sought, was going to partake of a "general search".

Furthermore, there existed in the *Osborn* case a situation of authentic exigency, an arguably overriding need—" * * * It was imperative to determine whether the integrity of their Court was being undermined, and highly undesirable that this determination should hinge on the inconclusive outcome of a testimonial contest between the only two people in the world who knew the truth—one an informer, the other a lawyer of previously good repute" (385 U.S. at 330). This last puts a case for electronic search with advance judicial permission which is a far cry from the justification sought to be made in the present case.

Finally, contrast *Osborn* with our case as regards the egregiously slack, conclusory and probatively weak and unconvincing "factual showing" made before the "magistrate" in our case on the application for the electronic search "warrant", as contrasted with the meticulous and all but perfectionistically specific showing made to the District Judges in the *Osborn* case.

If the Court should conclude that the *Katz* and *Osborn* standards apply, there is no doubt that the wiretap evidence herein must be suppressed—even without the Court's applying the *Berger* ruling that §813-a is unconstitutional

on its face. The present wiretap fails of constitutional acceptability for several reasons—insufficient factual showing in the application, i.e., the unreliability of the informers, the attenuation of the hearsay used in the wiretap affidavits, the staleness of the alleged inculpatory information and, in short, the failure of the affidavits to establish "reasonable cause" or "probable cause"; non-exigency; excessive duration; absence of restriction to insure only discriminate evasedropping within the minimum limits of necessity; failure to particularize either the conversation to be overheard or the person; dubious need for the eavesdropping in point of the nature of the alleged crime involved, as posing no particular overriding public or private-safety need to resort to electronic spying. The ex parte Court order, and the execution of the permitted wiretapping, were grossly aggrieving under even minimal "search and seizure" tests as to scope and duration of the "search".

Certiorari is justified, indeed required, to bring about in this case, on the high authority of this Court, a re-assertion of the standards of the Fourth Amendment "probable cause" for "search" affidavits. *A fortiori* those standards are needed in connection with the form of "search" which is connoted by the peculiar "search" activities under State permissive wiretap legislation, as is the case here.

IV

[Question Presented No. 9]

The judgment below should be reviewed in several other aspects relating to both the wiretapping and the search, i.e., viewing the overall conduct of the police in this case in constitutional terms, the conduct of the police officers fell far

below the Fourth Amendment and due process standards established by this Court under the test of "the total atmosphere of the case." *United States* v. *Rabinowitz,* 339 U.S. 56, 66 (Frankfurter, J., dissenting). See also *Rios* v. *United States,* 364 U.S. 253, 255 ("a particular evaluation of the conduct of the officers involved").

The Court customarily examines the record facts in search-and-seizure cases in this comprehensive manner. *E.g., Henry* v. *United States,* 361 U.S. 98; *Jones* v. *United States,* 362 U.S. 257; *Go-Bart Importing Co.* v. *United States,* 282 U.S. 344.

Let us note the several ways in which the conduct of the police officers in this case violated the above standards:

Spoliation of Evidence and Improper Keeping of Records

(1) Perhaps the most notable instance in the epidemic of "loss", "misplacement" or destruction of documentary evidence on the part of the police in this case is that of Dr. Cohen's office desk diary calendar. Detective Toolan, describing the search activities at Dr. Cohen's office on the night of September 2-3, 1960 said that Policewoman O'Meara examined the calendar or diary on Dr. Cohen's desk and that she "found a name that meant something to her from her investigation up to that point, and she took that with her" (R. 117); also that "during the course of the entire time that we were in the doctor's office, Gloria O'Meara was behind the desk and she was looking through patients' cards and through that calendar diary that I referred to" (R. 118). Chief Policewoman Melchionne said "I have heard that they did take a diary and that same has been unavailable at this point", "misplaced" (R. 171).

Toolan also said that he does not know where the calendar diary is now (R. 148). Policewoman Munroe testified that Miss O'Meara told her she had looked at the calendar diary in Dr. Cohen's office during the search (R. 351).

Miss O'Meara herself stated that this calendar had been missing since sometime in 1961 (R. 393), she had taken it to Assistant District Attorney Panzarella (R. 395), after that she had seen it around for several months but she had since searched for it and could not find it (R. 395-396).

The People attempted, through the testimony of Miss O'Meara, to "rehabilitate" this missing calendar or diary by low-quality secondary "evidence" of Miss O'Meara's verbally stated "recollections" of the contents of the diary and by her alleged notes (as to which see further *infra*), to all of which a defense objection was sustained (R. 393-396). The admission by Miss O'Meara that the name of at least one complainant was found in the diary highlights its importance and the undoubted use of the diary in the investigation of Dr. Cohen after his arrest which led to the indictments herein. As a matter of fact, the District Attorney offered to concede that all of the police efforts, including the wiretapping, led to only one complainant, Esther Richards (R. 337-338). Since the diary was the only record taken from the defendant's office despite the examination of the patients' index cards as well, the inference from this theory of the District Attorney is overpowering that the diary was not only useful to the police but also, that the diary supplied the leads to the other complainants. Furthermore, Miss O'Meara destroyed relevant notes relating to her examination of the diary and the patients' index cards (R. 487, 489, 495-496).

In *Campbell* v. *United States*, 373 U.S. 487, and in the earlier decision in the same case in 365 U.S. 85, the Court indicated that in a proper case attention must be given to the question of what sanctions would be appropriate against the Government if it developed that "Jencks Act" (18 U.S.C. §3500) notes which were producible had been destroyed and no copy had survived. The Court also intimated that the sanctions in such a situation would be those under sub-section "d" of the Jencks Act, which provides, *inter alia*, that "The Court shall strike from the record the testimony of the witness" as to whom a producible statement is not delivered to the defendant. The *Campbell* cases, *supra*, have even left open the question of applying such sanctions against the Government where the destruction of the document involved may have been done in good faith. As noted by Circuit Judge Aldrich in his concurring opinion in *Campbell* v. *United States*, 303 F. 2d 747, 751 (C.A. 1 1962), " • • • the Supreme Court indicated the possibility of consequences unfavorable to the Government even if the destruction were innocent." The Courts of New York State have adopted the "Jencks" policy (*People* v. *Rosario*, 9 N.Y. 2d 286; *People* v. *Agron*, 10 N.Y. 2d 130), but they have not applied that policy here.

The New York Courts also recognize the need to afford some appropriate remedy to a party whose property seized in an illegal search has been destroyed—*Metallic Flowers* v. *City of New York*, 4 A.D. 2d 292, 164 N.Y.S. 2d 227, 234 (1st Dept. 1957), mentioning as among the available remedies replevin and an action for damages. Obviously these latter suggested remedies were not adequate in our case. See also *People* v. *Strollo*, 191 N.Y. 42 (1908); *People* v. *Bell*, 21 A.D. 2d 660 (1964); *People* v. *Genova*, 15 A.D. 2d 44 (1961), where the loss of trial exhibits by the People

which are essential for appellate review requires reversal of a conviction and dismissal of the charges against the defendant. How much more aggrieving is the loss of essential documentary items *before trial!*

Further analogous light is shed on the instant situation by the familiar authorities which require the vitiating of a conviction in a criminal case when evidence has been suppressed by the prosecution. *E.g., Brady v. Maryland,* 373 U.S. 83.

That the precise issue here presented in regard to the loss or destruction of petitioner's office calendar or diary does not appear to have arisen in any previous proceeding for suppression of illegally seized evidence, should not result in depriving petitioner of a remedy. The granting of our motion to suppress by Justice Rinaldi was justified on the ground, without more, of the People's negligent or otherwise improper conduct in losing Dr. Cohen's office calendar or diary. Such was entirely in keeping with the spirit of the Fourth Amendment tests above mentioned whereby the Courts are called upon to consider "the total atmosphere of the case" and to make a "particularized evaluation of the conduct of the officers involved." The unavailability of the calendar or diary and the destruction of notes relating to the other facets of the search (i.e., patients' index cards), when taken together with the numerous and important other instances of unfairness and violation of due process on the part of the People's officers in this case, required the granting of our motion to suppress as a means of vindicating the Fourth Amendment standards just mentioned.

(2) Rivalling the "lost" diary item is Policewoman O'Meara's astounding "dot-dash" testimony (i.e., coded

notes containing "dot" and "dash" symbols) (R. 477-480), and the manner in which she prepared her notes of the search and the alleged prior surveillance of the defendant's office (R. 845 et seq.). In this branch of the case, the witness' tactical preoccupation seemed to be, at the moment, not to shield what had happened prior to September 2, 1960,* but to shield what happened on and after those days. Miss O'Meara's "dots" were supposed to indicate that a name on her pre-search list was found on a patient's index card or in the diary in petitioner's office; a "dash" was supposed to indicate that the particular name on the pre-search list did not appear on such an index card or in the diary (R. 478). What is interesting, therefore, is that in only one instance covered by the questioning on this subject did Miss O'Meara's supposed system of dots and dashes produce an unequivocal or even a coherent conclusion, and in that single instance the name (Basile) is not important for this case (R. 479). Thus, of the names concerning which she testified on her pre-search list, the name Albertino had a dash and an allegedly accidental or inadvertent dot that "looked" to the witness like merely the dotting of the letter "i" (R. 478); the names Holman, Pack and Richards each had both a dot and a dash, of which the witness said (suddenly amending the supposed meaning of her supposed code) that this meant no index card was found for these names on the pre-search list (R. 478-479).

It is plain to see what this testimony of Miss O'Meara concerning the "dot-and-dash" code and the notes of surveillance was designed to accomplish. Its purpose was to suggest that no information which led to the within indictments was obtained from the patients' index cards or the "lost" diary during the search of September 2-3, 1960.

---

* The date of the search.

(3) Other instances of destruction, loss, misplacement or failure to keep records relevant to the issues of the motion to suppress are: (a) Policewoman O'Meara's admitted, unexplained and unexcused destruction of several pages from her memorandum book relating to the crucial happenings of September 2, 1960 (R. 485-489); (b) Miss O'Meara's similar destruction or misplacement of other contemporaneous notes concerning the events of the afternoon of September 2, 1960 which had allegedly been used by her to write up her memorandum book of a subsequent date (R. 489-491); (c) Miss O'Meara's similar admitted destruction of an unknown number of other relevant notes and papers (R. 508-509); (d) the admitted destruction by Detective Malapero of the paper on which he allegedly wrote down the license plate number of the Esther Richards automobile on September 2, 1960 (R. 223-225); (e) the failure of Detectives Toolan and Malapero to have kept any notes or memoranda at all, under direct orders of the District Attorney's office that such omission to keep records should be deliberately done in this case despite police regulations which require the keeping of such notes and memoranda (R. 111, 132-133, 165, 223-225); (f) the admitted failure of Chief Policewoman Melchionne to make or keep any notes or memoranda concerning this investigation or, especially, concerning her vital conversations with Detective Toolan, despite her testimony that she had not been instructed by the District Attorney not to keep notes or memoranda about this case (R. 178, 211-212)*; (g) the failure of Policewoman Munroe to make or keep any notes or

---

* Note the inconsistency as between the Toolan-Malapero testimony and the Melchionne testimony concerning alleged instructions from the District Attorney as to the keeping of notes and memoranda.

memoranda except those consisting of her typewritten transcripts and lists in regard to the wiretap, despite the testimony of Mrs. Melchionne that her policewomen had not been instructed not to keep notes or memoranda about this case and her testimony that her policewomen did keep their own notes and that she assumes they still have them (R. 178-179, 291, 293-294); (h) the absence from Miss O'Meara's allegedly very complete notes concerning the arrest, of any mention of the petitioner's alleged invitation to the police to search his office (R. 498-500).

It is remarkable, in fact uncanny, how the instances throughout this case in which records are missing or claimedly were never made, as well as the instances in which the police notes or the police memories are deficient or flawed and the police veracity questionable, happened to touch the most sensitive areas of the case, *viz.*, the areas which would reveal illegal wiretap-obtained leads or illegal search-obtained leads, and would refute claimed legal evidentiary leads. The police reports which tended to be most "available" were those relating to alleged "surveillance" activities, and those least available related to the wiretap and the search. Most striking, of course, was, again, the marvelous condition of the notes and records of Miss O'Meara, which were helpfully "complete" on points desired by the prosecution and "missing" or incomprehensibly unclear on points desired by the defense.

The combination of all of the above improprieties, deficiencies and official neglects on the part of the People's officers in this case is an important factor, we submit, to be considered in applying the tests of "the total atmosphere of the case" in regard to Fourth Amendment reasonableness (*Rabinowitz, supra*), and of "a particularized evaluation of the conduct of the officers involved" (*Rios, supra*).

The Extraordinary Conduct of the Police in Extracting Alleged Admissions from the Complainant Esther Richards

In point of sheer luridness in the "total atmosphere of the case;" if not of constitutionally prejudicial immediacy and directness of impact upon the petitioner Dr. Cohen himself, the following is perhaps the single most climactic item in this case:

Policewoman Munroe testified that she and Officer Toolan "intercepted" Esther Richards in an automobile on a street in Brooklyn on September 2, 1960, that this woman was subjected to repeated and prolonged interrogation while thus held in police custody, that she was taken to Kings County Hospital, *after her denial that she had been aborted,* and there subjected to a gynecological examination which the hospital doctor found to be *negative for abortion* (R. 278, 282, 327-331), that she was thereafter further interrogated, and was finally taken to the District Attorney's office for still more interrogation, all of which is alleged to have culminated, after further alleged denials by her, in an admission of an abortion committed by the petitioner (R. 328-330).*

Unless Esther Richards consented to these phenomenal impositions by the police officers—there being nothing in the record to support any such suggestion of consent or waiver (indeed, Miss Richards for a long time denied she was aborted)—it is beyond any need for argument or citation of authority that she was subjected to unlawful arrest

* We may note here that Miss Munroe had no notes of her alleged conversations with Esther Richards (R. 331), this being one more instance of the seemingly convenient unavailability of police notes and memoranda in this case.

and to a barbarously unconstitutional search of her person in the most odiously intimate form imaginable. Cf. *Rochin* v. *California*, 342 U.S. 165, annotated in 96 L. ed. 194 (*"Physical Examination or Exhibition of, or Tests upon, a Suspect or Accused, as Violating Rights Guaranteed by Federal Constitution"*). Esther Richards herself, then, in a proper proceeding would undoubtedly be entitled to suppression of any alleged admission thus extracted from her. It follows also, therefore, incidentally, that the alleged evidence thus secured from Esther Richards was "illegal" in the literal and immediate sense of §249 of New York's own Code of Criminal Procedure ("The Grand Jury can receive none but legal evidence"). *Indeed, by virtue of this latter New York State Statute, the petitioner herein had literal "standing" to object to the Esther Richards item* (and he so urged in the courts below—e.g., "Appellant's Brief" in the Court of Appeals, p. 73).

In these circumstances, we submit that the usual limitations of "standing" to object to the use of evidence illegally seized from another person (*Jones* v. *United States*, 362 U.S. 257) do not apply, that the petitioner herein had such "standing" to move to suppress the alleged Esther Richards admission, whether or not such alleged admission was introduced in evidence before the Grand Jury, and that in any event the facts should be taken into account in evaluating the "total atmosphere of the case".

The wrong of the police barbarity here involved cries out for judicial redress of the derivative wrong done to the present petitioner. The issue is one that goes beyond the law of search-and-seizure; it is an issue of constitutional due process because it involves police "conduct that shocks the conscience" and brings into operation the principle

"that convictions cannot be brought about by methods that offend 'a sense of justice.'" *Rochin* v. *California, supra,* at 342 U.S. 172, 173.

In *Wong Sun* v. *United States,* 371 U.S. 471, the Court disapproved the use against one person of inculpatory admissions by another person where the latter admissions were obtained in violation of the Fourth Amendment. This ruling in *Wong Sun* is analogously applicable here.

We respectfully submit that the Esther Richards "search" episode impurified so fatally the "total atmosphere of the case" and required so unfavorable an "evaluation of the conduct of the officers involved" as to have justified on this ground alone the granting of the within motion to suppress in its entirety in order to vindicate the requirements of Fourth Amendment reasonableness.

Further Remarks As to the Relationship Between The Wiretap and The Search

As noted, the Appellate Courts below did not rule on any of the above described issues as to the overall police conduct, the spoliation or loss of documents and reports, the police brutality towards Esther Richards, or as to any of the grave problems concerning the integral relationship between the wiretap and the search.

It is impossible to see how the Appellate rulings below that the testimony of the females named in the indictment is usable at the trial, can be urged as meaning that the Appellate Courts below "held" that the police got the names of those women from the wiretap rather than from the search. The Courts below did not have before them the wiretap, or any stenographic transcripts thereof, or Dr. Cohen's "lost" diary; and, as seen, Justice Rinaldi

found that the names came either from the search or the wiretap and search together.

The Appellate rulings below also present these further anomalies: How could the arrest on September 2-3 be invalid (as the Appellate Division, affirmed without opinion by the Court of Appeals, held it was) if the antecedent wiretaps were valid (as the Appellate Division, again affirmed by the Court of Appeals, also held), i.e., how could the arrest be invalid since it was undisputedly based on the alleged Esther Richards happening, and that episode was unquestionably generated by the wiretap which the Appellate Courts below have held valid? And how, furthermore, could the Appellate Division (and the Court of Appeals) approve the order for return of the property seized at the time of arrest in petitioner's home if the arrest was thus generated by wiretap information which, again, the Appellate Division (and the Court of Appeals) found to be legally obtained?

These peculiarities in the structure of the Appellate rulings below require at the very least—in the event that this Court too should decline to undertake review of the constitutionality of the wiretaps or should uphold their constitutionality—that certiorari should be granted to direct that the matter be remanded for further proceedings to make definitive factual findings as to whether the names of the females came from the search or the wiretap.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

KLEINMAN, GOLD & LANDSMAN
Attorneys for Petitioner
Carl I. Cohen

ABRAHAM GLASSER
Of Counsel

[Appendices follow]

[See also separately printed Supplemental Appendix]

APPENDIX A

Decision of New York Court of Appeals After Reargument (April 18, 1968)

STATE OF NEW YORK
IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Eighteenth day of April, A.D. 1968.

Present:

HON. STANLEY H. FULD,

Chief Judge, Presiding.

No. 223

THE PEOPLE &C.,

Respondent,

vs.

CARL I. COHEN,

Appellant.

This cause having been reargued before the Court of Appeals on April 8, 1968, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED AND ADJUDGED, upon reargument, that the original decision of this Court dated July 7, 1966 be and the same hereby is adhered to. No opinion. All concur except Fuld,

Appendix A—Decision of New York Court of Appeals After Reargument (April 18, 1968)

Ch. J., who dissents and votes to reverse in the following memorandum: Until the United States Supreme Court has definitively passed on the question here presented, I adhere to the views which I expressed in my dissenting memorandum on the appeal proper herein (18 NY 2d 650) and in my dissenting opinion in *People* v. *Kaiser* (21 NY 2d 86, 104).

A Copy

[Seal]

Raymond J. Cannon

Clerk

APPENDIX AA

Remittitur of New York Court of Appeals

COURT OF APPEALS

STATE OF NEW YORK, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 7th day of July in the year of our Lord one thousand nine hundred and sixty-six, before the Judges of said Court.

WITNESS,

THE HON. CHARLES S. DESMOND,

Chief Judge, Presiding.

RAYMOND J. CANNON,

Clerk.

Remittitur July 7, 1966

No. 223

THE PEOPLE &C.,

Respondent,

vs.

CARL I. COHEN,

Appellant.

BE IT REMEMBERED, That on the 9th day of May in the year of our Lord one thousand nine hundred and sixty-six, Carl I. Cohen, the appellant—in this cause, came here unto

the Court of Appeals, by Kleinman, Gold & Landsman, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And The People &c., the respondent—in said cause, afterwards appeared in said Court of Appeals by Aaron E. Koota, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued and reargued by Mr. Eugene Gold, of counsel for the appellant—, and by Mr. William I. Siegel, of counsel for the respondent—, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed. *And upon reargument the said Court of Appeals did further order and adjudge that the original decision of July 7, 1966, be adhered to.**

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, as aforesaid.

---

* Italics added by counsel for petitioner Cohen in the within petition for certiorari (italicized portion refers to decision of April 18, 1968, Appendix A hereto, p. 1a, *supra*).

Appendix AA—Remittitur of New York Court of Appeals

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON

Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
ALBANY, JULY 7, 1966.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

(SEAL)

RAYMOND J. CANNON

Clerk

APPENDIX B

"Memorandum" Report of Decision (July 7, 1966) of New York Court of Appeals (Including Dissenting Opinion of Chief Judge Desmond and Judge Fuld), 18 N.Y. 2d 650

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. CARL I. COHEN, Appellant.

Argued June 2, 1966; decided July 7, 1966.

Crimes—wiretapping—Supreme Court vacated and set aside order authorizing telephone wiretapping of defendant's office telephone, restrained use at defendant's trial of any conversations obtained as result of wiretapping pursuant to said order and any leads, clues and information obtained as result of use of said wiretapping, restrained use at trial of any articles of evidence seized or examined in search of defendant's home and office and any leads, clues and information obtained as result of use of said articles, and also restrained use at trial of testimony of female persons named in specified indictments—Appellate Division modified, agreeing that evidence seized in search had been properly suppressed, but finding that order authorizing wiretapping had been based on sufficient affidavits —order of Appellate Division affirmed.

People v. *Cohen*, 24 A D 2d 900, affirmed.

APPEAL, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered November 29, 1965, which modified and, as modified, affirmed an order of the Supreme Court (DOMINIC S. RINALDI, J.;

Appendix B—"Memorandum" Report of Decision (July 7, 1966) of New York Court of Appeals (Including Dissenting Opinion of Chief Judge Desmond and Judge Fuld), 18 N.Y. 2d 650

opinion 42 Misc 2d 403), entered in Kings County, which, upon motion by defendant, (1) vacated and set aside an ex parte order issued on July 28, 1960 by a Supreme Court Justice authorizing telephone wiretapping of defendant's office telephone, (2) restrained and precluded the District Attorney of Kings County and all police officers of the City of New York from using upon defendant's trial (a) any and all articles of evidence seized or examined by police officers in defendant's home and office on September 2 and 3, 1960 and any and all leads and clues revealed or any information directly or indirectly obtained as a result of the use of said articles of evidence, (b) any and all telephone conversations obtained as a result of telephone wiretapping of defendant's office telephone pursuant to the ex parte order of July 28, 1960 and any and all leads and clues and any information obtained as a result of the use of said wiretapping and (c) the testimony of the female persons named in five specified indictments, and (3) directed the return to defendant of all the property seized from his person and office on September 2 and 3, 1960 and any and all photographs, copies, notes or memoranda of the articles seized or examined. The modification consisted of deleting the paragraphs which vacated and set aside the ex parte order of July 28, 1960 and which restrained and precluded from use upon defendant's trial the telephone conversations and the leads, clues and information obtained as a result of the wiretapping pursuant to said order and the testi-

Appendix B—"Memorandum" Report of Decision (July 7, 1966) of New York Court of Appeals (Including Dissenting Opinion of Chief Judge Desmond and Judge Fuld), 18 N.Y. 2d 650

mony of the female persons named in the specified indictments. The Appellate Division found that the denial of a prior motion by defendant to vacate the ex parte order of July 28, 1960 (see 41 Misc 2d 158) had not been on the merits and, accordingly, did not bar the present litigation; that the affidavits in support of the People's motion for the order authorizing the wiretapping (see 42 Misc 2d 403, 406) were sufficient, but that the search had been conducted without defendant's consent and without a warrant and had not been incidental to a lawful arrest and that, accordingly, evidence seized during it had properly been suppressed. In the Court of Appeals defendant argued, in part, that the affidavits upon which the order authorizing the wiretapping was issued were insufficient and failed to show "reasonable ground to believe that evidence of crime" might be obtained, as required by section 813-a of the Code of Criminal Procedure; that said section was unconstitutional as applied to the present case; that all evidence obtained or derived directly or indirectly from the wiretapping should be excluded as violative of Federal constitutional and statutory prohibitions, and that the wiretapping was inextricably interwoven with the unconstitutional search of September 2-3, 1960.

Eugene Gold for appellant.

Aaron E. Koota, District Attorney (*William I. Siegel* of counsel), for respondent.

Order affirmed; no opinion.

Appendix B—"Memorandum" Report of Decision (July 7, 1966) of New York Court of Appeals (Including Dissenting Opinion of Chief Judge Desmond and Judge Fuld), 18 N.Y. 2d 650

Concur: Judges VAN VOORHIS, BURKE, SCILEPPI, BERGAN and KEATING. Judge FULD dissents in the following memorandum in which Chief Judge DESMOND concurs: I adhere to the views I expressed in *People* v. *Dinan* (11 N Y 2d 350, 357)—that evidence should be excluded if obtained by interception of telephone communications in contravention of the Federal Communications Act, and, accordingly, vote to reverse and to order a new trial.

APPENDIX C

Opinion of Appellate Division, Second Department, Supreme Court of New York, 24 A.D. 2d 900

In a criminal action, the People appeal from an order of the Supreme Court, Kings County, entered March 13, 1964 after a hearing, which (a) granted defendant's motion to suppress certain evidence allegedly obtained as the result of an unlawful search and seizure and as a result of telephone wire-tapping of the defendant's office telephone pursuant to an *ex parte* order of said court, issued July 28, 1960; (b) vacated said *ex parte* order; and (c) precluded the use at trial of any evidence or leads resulting therefrom. The People have filed the statement required by statute (Code Crim. Pro., § 518-a) in order to perfect the appeal from the said order.

Order modified (1) by amending the first decretal paragraph to provide that defendant's motion be granted only to the extent set forth in the third and sixth decretal paragraphs (as hereafter indicated) and (2) by deleting therefrom the second, fourth and fifth decretal paragraphs. Order, as so modified, affirmed.

The defendant, a physician, was charged in five indictments with nine counts alleging the commission of criminal abortions and with one count charging the crime of attempted abortion. His motion to suppress the fruits of a search of his office and to preclude the use of leads obtained through the use of a wiretap on his office telephone was granted (42 Misc 2d 403) after his prior motion to vacate and set aside the original *ex parte* wiretap order had been denied (41 Misc 2d 158).

Appendix C—Opinion of Appellate Division, Second Department, Supreme Court of New York, 24 A.D. 2d 900

The denial of defendant's motion to vacate and set aside the original order authorizing the wiretap did not reach the question of the validity of said order. The motion was denied on a finding that the moving papers in support of the motion to vacate were insufficient. Since the merits of the order were not reached, the ultimate holding does not bar a relitigation of the matters not specifically passed upon (Eagle Lion Studios v. Loews, 248 F. 2d 438, 444, affd. 358 U.S. 100; Southern Pac. R. Co. v. United States, 168 U.S. 1; St. Joseph Union Depot Co. v. Chicago R.I. & P. Ry. Co., 89 Fed. 648; cert. den. 172 U.S. 649; Schneider v. Schneider, 281 App. Div. 250).

The original wiretap order was a proper subject of judicial review in the same manner and to the limited extent permitted with respect to a warrant for search and seizure.

We hold that the affidavits in support of the People's motion for an order authorizing a wiretap were insufficient.

The finding that defendant did not consent to a search of his office is supported by the evidence. Since there was no warrant and the search was not conducted incidental to a lawful arrest, the evidence seized was properly suppressed.

BELDOCK, *P.J.*, CHRIST, HILL, RABIN and BENJAMIN, *JJ.*, concur.

APPENDIX D

Opinion of Justice Rinaldi, Supreme Court of New York, Kings County, 42 Misc. 2d 403

People, & C. v. Carl I. Cohen—The defendant is a physician who is charged with abortion under indictments returned in November, 1960. He now moves under Code of Criminal Procedure, sections 813-c, et seq., to suppress evidence obtained by telephone wiretapping and by a search of his private office. The defendant's private office telephone was tapped by police officers from July 29 to September 2, 1960, pursuant to an ex parte order issued on July 28, 1960. It is conceded by the People that the information obtained from such wiretaps resulted in the leads which culminated in the defendant's arrest for abortion at his home on the night of September 2-3, 1960. At that time, a search was also made at his home and office. The arrest and search was made without a warrant.

This court conducted an extensive evidentiary hearing on the motion to suppress. There was made available to the court, in camera, the affidavits which were presented in support of the application for the ex parte wiretap order, as well as other information.

There can be no serious dispute that pertinent New York statutes contemplate and authorize a review of wiretap orders. Code of Criminal Procedure, section 813-a, authorizing ex parte wiretap orders, itself contemplates, by its incorporation of the constitutional standard "reasonable ground" (which is equivalent to "probable cause"), and by requiring preservation of the papers, that the matter shall be subject to judicial review when necessary. Code of Criminal Procedure secs. 813-c et seq., re motions

to suppress evidence, must be read in the light of the virtually identical Federal motion procedure after which it is obviously patterned. That Federal procedure, it is settled, includes motions to suppress wiretap evidence. New York's new motion procedure (secs. 813-c et seq.) was adopted with the expressly declared legislative purpose of bringing this state into compliance with Federal constitutional search-and-seizure requirements under the Mapp case (367 U. S. 643).

CPLR, section 4506 (formerly C. P. A. sec. 345[a]), also adopted in an express effort by the legislature to meet Federal standards, make inadmissible in criminal prosecutions evidence and evidentiary leads obtained by illegal wiretapping. Therefore, when, as here, a defendant in a criminal prosecution invokes the new motion to suppress procedure in aid of his rights under the new CPLR section 4506, it is impossible to see how the court can avoid the duty of determining whether a claimedly legal telephone wiretap, assertedly authorized under this State's permissive ex parte wiretap legislation above cited, was in fact legally authorized or not under the statutory standards of said permissive procedure. The court is aware of the contention of the People that a prior proceeding which was commenced before Mr. Justice Arkwright who denied the motion to vacate the wiretap order is now a bar to the instant motion (People v. Cohen, 41 Misc. 2d 158). The court finds that such proceeding does not affect its right to pass upon the validity of the wiretap order. Such prior proceeding did not avail itself of the process of the Code of Criminal Procedure, section 813-c et seq. and in any event

never reached the merits of the issue as to the validity of such order. Mr. Justice Arkwright in his opinion denying the application before him clearly stated, and this court is in complete agreement, that our courts have the inherent power to reconsider the issuance of a wiretap order if perjury or error be shown in the original supporting affidavits or for any other cogent reason. Since the defendant at that time could only furnish limited information to him, his denial was solely on procedural grounds. The appeal from his order was dismissed by the Appellate Division, Second Department (N. Y. L. J., April 18, 1963, p. 16), and leave to appeal to the Court of Appeals was denied on July 10, 1963, by Fuld, J., and the court en banc (13 N. Y. 2d 595).

That being the case, this court deems itself under a duty to consider the issues raised by this motion on the merits. In order to do so, it must determine whether the "reasonable ground" requirement of the Code of Criminal Procedure, section 813-a, was satisfied in the issuance of the wiretap order.

The order was issued on July 28, 1960, by a former justice of this court on the supporting affidavits of Kenneth J. McCabe, chief assistant of the district attorney, now deceased, Alvin G. Rosen and his "girl friend" Audrey Salzman. These two persons were the subject of an investigation by the district attorney in crimes involving forgery, burglary and arson, none of which concerned the defendant in this case, in which it was claimed they had participated. During the course of such investigation, Rosen, in an ob-

vious attempt to curry favor with the police, volunteered information that the defendant was conducting an "Abortion Mill." The information which he furnished to the police and which was incorporated into the supporting affidavits was as follows: That Rosen and his "girl friend" had at one time visited the defendant to arrange for her abortion; that they could not agree on price; that they left and did not return because she later discovered that she was not pregnant; that a friend of the "girl friend" had once been aborted by the doctor in July or August of 1958 and subsequently again a year later and also in October or November of 1959. Rosen stated and it was so set forth in the supporting affidavits that he had obtained this information from his "girl friend" who in turn had learned of this from her friend. No supporting affidavit was obtained from the "prolific" friend. Thus supporting affidavits based to a great extent on hearsay twice removed and on events which had transpired a long time prior thereto, became the basis for the issuance of the wiretap order. There is also a serious question as to whether or not the police had previous sufficient other dealings with the informer which would have led them to depend upon the reliability of their information. In any event, the police testified that they proceeded to "tap" the office telephone of the defendant and as leads were obtained, they questioned certain females who were observed leaving his office and obtained statements from them which led to the eventual arrest and indictment of this defendant.

In the light of the foregoing, was there "reasonable ground" to believe that "evidence of crime may thus be

obtained'' in order to comply with the statutory requirement under section 813-a?

It is elementary that there can exist no ''probable cause'' to search for mere ''future'' crimes and case law as to ''probable cause'' is concerned with ''past'' or ''present'' crimes (Brinegar v. United States, 338 U. S. 160). At the most therefore, wiretapping may only be permitted upon a showing which meets the tests of ''probable cause'' that a crime has been or is being committed. Under our law as it is presently constituted, law enforcement officers are on the horns of a dilemma. Wiretapping is a crime under federal statutes but is permissible in our state if made with the sanction of a court order. And yet, if such sanction is obtained and ''taps'' made, the question presents itself whether those officers connected with such wiretapping may not be prosecuted for the violation of a federal statute. Wiretap orders are therefore issued with great reluctance and it has become the common practice to avoid issuance if other means are available to law enforcement agencies to obtain the required results.

The reliability of the informers in order for the issuing court to determine for itself ''reasonable grounds'' or ''probable cause'' becomes of paramount importance. If the police vouch for such reliability facts must be stated and brought to the attention of the court to satisfy it that such is the case. The informers, Alvin Rosen and Audrey Salzman at the time they gave information to the police concerning this defendant were themselves deeply enmeshed in what was apparently a major ring of burglars, arsonists and forgers. It is true that they ''accurately'' confessed

their own misdeeds and those of their accomplices in which they had already been implicated. They, at no time, however, previously informed the police as to crimes in which they themselves were not implicated. On that basis, the police had no criteria to judge their reliability concerning information as to this defendant. Vouching as to their reliability had no basis in fact, " * * * the affiant must * * * demonstrate that the informant has established a reputation for reliability so as to be worthy of belief" (*United States* v. *Ramirez*, 279 F. 2d 712, 715, C. A. 2, 1960).

Judge Sobel of this court, in his recent Law Journal articles (October 29, 1963) referred to "the rather strict standards of reliability of informers" citing the leading cases of *Draper* v. *United States* (358 U.S. 307), *Jones* v. *United States* (362 U. S. 257), *Henry* v. *United States* (361 U. S. 98). One of our leading cases, *People* v. *Coffey* (12 N. Y. 2d 443), along the same lines specifies that "simple, untested rumor is not ground enough nor * * * is untested information from a person of no established reliability, or suspicion alone. Substantiation of information can come either from the the informer's own character and reputation or from the separate objective checking of the tale he tells." Although these decisions and a multitude of others in the same vein, involved search and seizure, the same standards, at the least, must be applied to wiretap orders. Both types of order are obtained ex parte. However, execution of the search warrant necessarily reveals its issuance and objectives. The same may not be said of wiretap orders which are carried out surreptitiously except in those rare in-

stances where the object of the wiretap learns of it through accident. It would not be amiss for the court to state that, if at all, the standards to test the advisability of issuing a wiretap order should be much more stringent than those applied to search warrants.

The court cannot find anything in the original wiretap affidavits which meet the foregoing tests as to statutory requirements of "reasonable grounds" and "reputation for reliability." It must therefore conclude that the wiretap order was issued contrary to statutory and settled law and the said order is hereby vacated.

The wiretapping activity from July 29 to September 2, 1962, being thus determined to have been illegal in toto, all evidence and all evidentiary leads obtained or derived from the wiretap, and all evidence obtained or derived from such leads, are hereby ordered suppressed and inadmissible pursuant to CPLR, section 4506. In order that there be no doubt as to this, the court finds, from the testimony at the hearing herein, and from the reasonable inferences based on the aforesaid, that the People obtained from the wiretaps, in the case of each of the females, whose alleged abortions are the subject of the indictments, the original information or leads upon which subsequent charges of abortion, or upon which subsequent investigation in turn leading to charges of abortion, were based.

The court finds further, and in conjunction with the findings above stated, that the People's claim that the original information or leads referred to in said above findings were obtained from surveillance or other police activity not inclusive of wiretapping, is not supported by any evidence

other than purely conclusory assertions of the police witnesses. The latter witnesses not having testified concerning any details or concrete circumstances whatever to support such conclusory claims of surveillance results, &c., and the evidence that the original information or leads came from wiretapping being strong and convincing, this conclusory contention of the People is hereby found not to have been established.

The court further finds that the list of names of females which Policewoman O'Meara brought with her to the defendant's office on the night of September 2-3, 1960, for the purpose of checking said list against defendant's private office records, consisted either of names obtained exclusively in the first instance from the wiretaps, or of names obtained by means so inextricably connected with the wiretaps as to be required to be deemed a product thereof as a matter of law and for the purposes of the instant proceeding. The only inference permitted by the testimony and by the other records of this proceeding is that the aforesaid list of names was in itself in fact either a sole product of the wiretap, or a joint product of the wiretap plus the defendant's office records (especially the lost diary or desk calendar as to which see further infra); or was the sole produce of said office records, and that said list to the extent that it was the product of said office records was made up during or after the search of the night of September 2-3, 1960, rather than being in existence prior thereto as claimed by the People.

The People admit, and the court finds that during the search of September 2-3, 1960, the People seized a diary

or desk calendar from the defendant's private office, and that said diary or calendar subsequently disappeared while in the custody of the People.

The People also admit, and the court finds that during the search of the night of September 2-3, 1960, the People made a detailed examination of the file of patients' index cards in the defendant's private office, and that the police took written notes thereof. In this connection the court further finds that the People have not produced such written notes in their entirety at the within hearing.

The People have not produced in this hearing any written notes or memoranda as to the contents of the lost diary or desk calendar. In the overall circumstances of this case, the conclusory assertions of the police witnesses that no information relevant to the issues of this proceeding was obtained by the People from the lost diary or desk calendar, cannot be taken probatively into account in the findings herein.

From the aforesaid findings it is concluded that the People obtain [sic] either from the wiretaps or from the search of September 2-3, 1960, or from both of these in combination, their original information or leads upon which subsequent charges of abortion, or upon which subsequent investigation in turn leading to charges of abortion, were based in the case of each of said females.

In as much as the arrest of the doctor was unlawful in that it was the fruit of wiretap activity now found by the court to have been illegal, the subsequent search of defendant's office immediately following his "arrest" was likewise

unlawful. The People claim that the search was justified because the defendant invited them to do so and consented thereto. There is a presumption against consent or waiver of a defendant's constitutional right to be free from unreasonable search and seizure and the People have the burden of affirmatively establishing free and voluntary consent (Johnson v. Zerbst, 304 U.S. 458; Pekar v. United States, 315 F. 2d 319; United States v. Smith, 308 2d 657, 663). The court finds that the People have failed to overcome this presumption and that the testimony concerning this phase of the proceedings, if anything, negates any such consent or waiver.

In view of the findings of the court, there is no need to make comment or evaluate the other points set forth in the briefs submitted by counsel for the defendant.

The motion is granted in all respects. Settle order.

APPENDIX E

Statutes Involved

1. 47 U.S.C. §605

§ 605. Unauthorized publication or use of communications

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning

of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided,* That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress. June 19, 1934, c. 652, Title VI, § 605, 48 Stat. 1103.

2. N.Y. Code Crim. Proc. §518-a

§ 518-a. Appeal from order granting motion for return of property or suppression of evidence, confession or admission; how taken

In taking an appeal from an order granting a motion for the return of property or suppression of evidence or for the suppression of a confession or admission pursuant to subdivision six of section five hundred eighteen, the people must file, in addition to a notice of appeal as required by section five hundred twenty-two, a statement asserting that the deprivation of the use as evidence of the property ordered to be returned or suppressed, or of the confession or admission ordered to be suppressed, has rendered the sum of the proof available to the people with respect to a criminal charge which has been filed in a court, or which the people propose to file or to cause to be filed in a court, either (1) insufficient as a matter of law, or (2) so weak in its entirety that any reasonable possibility of prosecuting such charge or prospective charge to a conviction has been effectively destroyed.

The taking of such an appeal and the filing of such a statement shall constitute a bar to (1) the filing of any criminal charge against the moving party involving the property in question, and (2) the prosecution of any existing criminal charge against the moving party involving the property, confession or admission in question, unless and until the order of return or suppression is reversed on appeal and vacated. Added L. 1962, c. 954, § 3; amended L. 1965, c. 846, § 3, eff. July 16, 1965.

3. N.Y. Code Crim. Proc. §813-a

§813-a. Ex parte order for eavesdropping

An ex parte order for eavesdropping as defined in subdivisions one and two of section seven hundred thirty-eight of the penal law may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overheard or recorded and the purpose thereof, and, in the case of a telegraphic or telephonic communication, identifying the particular telephone number or telegraph line involved. In connection with the issuance of such an order the justice or judge may examine on oath the applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable grounds for the granting of such application. Any such order shall be

effective for the time specified therein but not for a period of more than two months unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that such extension or renewal is in the public interest. Any such order together with the papers upon which the application was based, shall be delivered to and retained by the applicant as authority for the eavesdropping authorized therein. A true copy of such order shall at all times be retained in his possession by the judge or justice issuing the same, and, in the event of the denial of an application for such an order, a true copy of the papers upon which the application was based shall in like manner be retained by the judge or justice denying the same. As amended L.1958, c. 676, eff. July 1, 1958.

4. N.Y. Code Crim. Proc. §§813-c to 813-e

§813-c. The motion in general

A person claiming to be aggrieved by an unlawful search and seizure and having reasonable grounds to believe that the property, papers or things, hereinafter referred to as property, claimed to have been unlawfully obtained may be used as evidence against him in a criminal proceeding, may move for the return of such property or for the suppression of its use as evidence. The court shall hear evidence upon any issue of fact necessary to determination of the motion.

If the motion is granted, the property shall be restored unless otherwise subject to lawful detention, and in any event it shall not be admissible in evidence in any criminal proceeding against the moving party.

If the motion is denied, the order denying such may be reviewed on appeal from a judgment of conviction notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty. Added L. 1962, c. 954, §1, eff. April 29, 1962.

§813-d. Time of making and determination

1. The motion shall be made with reasonable diligence prior to the commencement of any trial in which the property claimed to have been unlawfully obtained is proposed to be offered as evidence, except that the court shall entertain a motion made for the first time during trial upon a showing that (1) the defendant was unaware of the seizure of the property until after the commencement of the trial, or (2) the defendant, though aware of the seizure prior to trial, has, only after the commencement of the trial, obtained material evidence indicating unlawful acquisition, or (3) the defendant has not had adequate time or opportunity to make the motion before trial.

2. If a motion has been made and denied before trial, the determination shall be binding upon the trial court, except that, if it is established that, after the making of such motion, the defendant obtained additional, material evidence of unlawfulness which could not have been obtained with reasonable diligence before the making of the motion, the court shall entertain another motion, or a renewal of a motion, during the trial.

3. When the motion is made before trial, the trial shall not be commenced until the motion has been determined,

except that, in the case of misdemeanors and offenses; the court having summary jurisdiction over such crimes and offenses may, by general rule of court, provide that the hearing and determination of such motions may be referred to the trial court for determination during the course of the trial upon the consent of the district attorney, or if no contrary general rule of court has been promulgated, the court before which the motion is made shall have discretion either to entertain the motion, or to refer it to the trial court for determination during the course of the trial if the district attorney consents thereto. When the motion is made during trial, the court shall, in the absence of the jury, if there be one, hear evidence in the same manner as if the motion had been made prior to trial, and shall decide all issues of fact and law.

4. If no motion is made in accordance with the provisions of this title, the defendant shall be deemed to have waived any objection during trial to the admission of evidence based on the ground that such evidence was unlawfully obtained. Added L.1962, c. 954, §1; L.1964, c. 490, eff. July 1, 1964.

§813-e. In what courts made

When an indictment, information or complaint upon which the defendant may be tried for a crime or offense has been filed in a court, or after the defendant has been held by a magistrate to answer a charge in another court, the motion shall be made in the court having trial jurisdiction of such indictment, information, complaint or charge.

Before any indictment, information or complaint upon which the moving party may be tried for a crime or offense

has been filed in a court, and before the moving party has been held by a magistrate to answer a charge in another court, the motion shall be made, if in a county outside of the city of New York, in the supreme court or the county court. In the city of New York, the motion, if made prior to September first, nineteen hundred sixty-two, shall be made in a county court or the court of general sessions of the county of New York as the case may be, and, if made on or after September first, nineteen hundred sixty-two, in the supreme court.

If the motion is made in one of such courts before such an indictment, information or complaint is filed, or before a magistrate has held the defendant to answer, and if, before determination of the motion, an indictment, information or complaint is filed in a different court, or the moving party is held by a magistrate to answer in a different court, the court before which the motion has been made shall not determine the motion but shall refer it to the court of trial jurisdiction. If, however, the motion has been determined at the time of the filing of the charge in the different court or at the time of the holding by the magistrate to answer in a different court, such determination shall be binding upon the court of trial jurisdiction, except that another motion may be made during trial pursuant to the provisions of section eight hundred thirteen-d. Added L.1962, c. 954, §1, April 29, 1962.

LIBRARY
SUPREME COURT, U. S.

FILED
JUN 13 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

No. [redacted] 141

CARL I. COHEN,

Petitioner,

—v.—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

SUPPLEMENTAL APPENDIX FOR PETITIONER

KLEINMAN, GOLD & LANDSMAN
Attorneys for Petitioner
66 Court Street
Brooklyn 1, New York

Of Counsel:
ABRAHAM GLASSER
52 Eighth Avenue
New York, N. Y. 10014

32 CASE PRESS INC., 421 HUDSON ST., N.Y.—OREGON 5-4540

INDEX

Appendix SA, Petition for Certiorari to the Court of Appeals of The State of New York in No. 614, October Term, 1966 ..... SA

Appendix SB, Notice of Motion, Affidavit and Brief For Re-Argument in New York Court of Appeals SB

Appendix SC, Appellant's Brief On Re-Argument in New York Court of Appeals ..... SC

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 614

CARL I. COHEN,

Petitioner,

Appendix SA, Petition for Certiorari to The Court of Appeals of The State of New York in No. 614, October Term, 1966

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

KLEINMAN, GOLD & LANDSMAN
Attorneys for Petitioner
66 Court Street
Brooklyn 1, New York

Of Counsel:
EUGENE GOLD

Case Press Inc., 60 Reade St., N.Y.—ORegon 4-2540

Appendix 5A, Petition for Certiorari to The Court of
Appeals of The State of New York in
No. 814, October Term, 1968

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 614

CARL I. COHEN,

Petitioner,

—v.—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

KLEINMAN, GOLD & LANDSMAN
Attorneys for Petitioner
66 Court Street
Brooklyn 1, New York

Of Counsel:
EUGENE GOLD

32 CASE PRESS INC., 421 Hudson St., N.Y.—ORegon 5-4540

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	5
Constitutional and Statutory Provisions Involved	7
Statement of the Case and of How the Federal Questions are Presented	7
Reasons for Granting the Writ	11
Spoliation of Evidence and Improper Keeping of Records	26
The Extraordinary Conduct of the Police In Extracting Alleged Admissions from the Complainant Esther Richards	33
Further Remarks As To The Relationship Between The Wiretap And The Search	36
Conclusion	37
Appendix A—Remittitur (Order of Affirmance of the Court of Appeals of the State of New York	A1
Appendix B—"Memorandum" Report of Decision of New York Court of Appeals (Including Dissenting Opinion of Chief Judge Desmond and Judge Fuld), 18 N.Y. 2d 650	A4
Appendix C—Opinion of Appellate Division, Second Department, Supreme Court of New York, 24 A.D. 2d 900	A8

PAGE

APPENDIX D—Opinion of Justice Rinaldi, Supreme Court of New York, Kings County, 42 Misc. 2d 403 A10

APPENDIX E—Federal Constitutional Points Urged by Petitioner Before Justice Rinaldi, Supreme Court of New York, Kings County, Quoted from "Summary of Defendant's Points" in the Typewritten Memorandum of Law Before the Latter Court A20

APPENDIX F—Federal Constitutional Points Urged by Petitioner Before the Appellate Division, Second Department, Supreme Court of New York, Quoted from Index to "Respondent's Brief" in the Latter Court A29

APPENDIX G—Points Urged by the Prosecution in the Appellate Division, Second Department, Supreme Court of New York, Quoted from Index to "Appellant's Brief" in the Latter Court A31

APPENDIX H—Federal Constitutional Points Urged by Petitioner Before the New York Court of Appeals, Quoted from Index to "Appellant's Brief" in the Latter Court A32

APPENDIX I—Points Urged by the Prosecution Before the New York Court of Appeals, Quoted from Index to "Respondent's Brief" in the Latter Court A35

APPENDIX J—Statutes Involved A36

Authorities Cited

Cases

	PAGE
Benanti v. United States, 355 U.S. 96	25
Boyd v. United States, 116 U.S. 618	23
Brady v. Maryland, 373 U.S. 83	29
Brinegar v. United States, 338 U.S. 160	21
Campbell v. United States, 373 U.S. 487	28
Campbell v. United States, 303 F. 2d 747 (C.A. 1 1962)	28
Carlo v. United States, 286 F. 2d 841 (C.A. 2 1961)	18
Cohen v. New York, 375 U.S. 985 (Oct. Term, 1963, No. 640)	4
Dailey v. United States, 261 F. 2d 870 (C.A. 5 1958), cert. denied 359 U.S. 969	18
DiBella v. United States, 284 F. 2d 897 (C.A. 2 1960), reversed on other grounds 369 U.S. 121	18
Draper v. United States, 358 U.S. 307	12, 19
Go-Bart Importing Co. v. United States, 282 U.S. 344	26
Gouled v. United States, 255 U.S. 298	22
Henry v. United States, 361 U.S. 98	19, 26
Hobson v. United States, 226 F. 2d 890 (C.A. 8 1955)	18
Jones v. United States, 362 U.S. 257	19, 26, 35
Lopez v. United States, 373 U.S. 427	22
Malloy v. Hogan, 378 U.S. 1	23
Mapp v. Ohio, 367 U.S. 643	23
Metallic Flowers v. City of New York, 4 A.D. 2d 292, 164 N.Y.S. 2d 227 (1st Dept. 1957)	29
Osborn v. United States, 382 U.S. 1023, 15 L Ed. 2d 538	25

PAGE

People v. Agron, 10 N.Y. 2d 130 28
People v. Berger, 18 N.Y. 2d 638 25

People v. Bell, 21 A.D. 2d 660 (1964) 29
People v. Dinan, 11 N.Y. 2d 350 25
People v. Genova, 15 A.D. 2d 44 (1961) 29
People v. Grossman, 45 Misc. 2d 557, 257 N.Y.S. 2d 266 (S. Ct. Kings Co. 1965) 12
People v. McCall, 17 N.Y. 2d 152 18
People v. Strollo, 191 N.Y. 42 (1908) 29
People v. Rosario, 9 N.Y. 2d 286 28
People v. Thayer, 47 Cal. Rptr. 780, 408 P. 2d 108 .. 25

Rios v. United States, 364 U.S. 253 26
Rochin v. California, 342 U.S. 165, annotated in 96 L. ed. 194 34

Schmerber v. California, — U.S. —, 16 L. Ed. 2d 908 25
State v. Bisaccia, 45 N.J. 504, 213 A. 2d 185 25

United States v. Joines, 258 F. 2d 471 (C.A. 3 1958), cert. denied 358 U.S. 880 18
United States v. Rabinowitz, 339 U.S. 56 26
United States v. Ramirez, 279 F. 2d 712 (C.A. 2, 1960) 19
United States v. Ventresca, 380 U.S. 102 16

Wong Sun v. United States, 371 U.S. 471 35
Wrightson v. United States, 222 F. 2d 556 (C.A.D.C. 1955) 18

Statutes

18 U.S.C. §3500 28
28 U.S.C. §1257(3) 4
47 U.S.C. §605 ..... 4, 25
N.Y. Code Crim. Proc. §249 34
N.Y. Code Crim. Proc. §518-a 7
N.Y. Code Crim. Proc. §813(a) 4, 18
N.Y. Code Crim. Proc. §813-c et seq. 2, 7

Constitution of the United States

PAGE

Fourth Amendment 4
Fifth Amendment 4
Fourteenth Amendment 4
Article VI 4

IN THE

Supreme Court of the United States

October Term, 1966

No.

CARL I. COHEN,

Petitioner,

—v.—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner, Carl I. Cohen, prays that a writ of certiorari issue to review the order or judgment entered in this case by the Court of Appeals of the State of New York on July 8, 1966, hereinafter described.

Opinions Below

The Court of Appeals of the State of New York did not write an opinion; two Judges of that Court (Desmond, C. J., and Fuld, J.) dissented in an opinion which is printed in Appendix B hereto, *infra*, as part of the "memorandum" report of the decision of the Court of Appeals, reported in 18 N.Y. 2d 650, — N.Y.S. 2d —. The opinion of the Appellate Division, Second Department, Supreme Court of New York, is reported in 24 A. D. 2d 900, 264 N.Y.S. 2d 886, and is printed in Appendix C hereto, *infra*. The opinion of the Supreme Court of New York, Kings County (Rinaldi, J.), is reported in 42 Misc. 2d 403, 248 N.Y.S. 2d 339, and is printed in Appendix D hereto, *infra*.

Jurisdiction

The judgment or order of the Court of Appeals of the State of New York sought to be reviewed was dated July 7, 1966. That judgment or order affirmed, after full appeal on the merits, an order of an intermediate appellate court of the State of New York, the Appellate Division of the Supreme Court, Second Department, entered November 29, 1965, which in turn had affirmed with modification an evidence-suppression order granted by the Supreme Court of the State of New York, Kings County (Rinaldi, J.) on motion of the within petitioner who had sought such suppression of evidence (pretrial) in a prosecution for abortion. The pretrial suppression order by Justice Rinaldi vacated an ex parte wiretap order and directed the suppression of evidence procured by such wiretap together with evidence secured by unlawful search and seizure. The above-mentioned appeals resulted in modification of Justice Rinaldi's suppression order by reversing the portion of that order which had vacated the ex parte wiretap order and had suppressed the wiretap evidence; the appeals affirmed the suppression of the search-obtained evidence.

Under the New York State statutory procedure for motion-to-suppress proceedings of the above-mentioned type (N.Y. Code Crim. Proc. §§ 813-c et seq.), the State (the People) is not permitted to pursue the State statutory avenue for review of an order of suppression (such as had here been granted by Justice Rinaldi) without first filing a formal statement asserting that the deprivation of the use as evidence of the items suppressed makes it impossible in law or effectively destroys any reasonable possibility in fact to carry forward the criminal prosecu-

tion involved to a conviction (*id.*, § 518-a). The State filed such a statement in this case as a condition of being permitted to appeal to the Appellate Division from Justice Rinaldi's order of suppression. We submit that, by reason of the statute last cited and the filing by the State of the statutorily required statement just mentioned, it is to be taken that under the law of the State of New York the suppression order of Justice Rinaldi was the equivalent of a final and not merely an interlocutory order in the within proceedings, i.e., Justice Rinaldi's suppression order, under the operation of the law and practice of the State of New York in the manner above-mentioned, was the legal or jurisdictional equivalent of an order dismissing the indictment or indictments involved.

In the appeal taken by the State to the Appellate Division, to review Justice Rinaldi's order of suppression, the partial modification ordered by the Appellate Division had the result of rendering the indictments no longer necessarily impossible to prosecute to a conviction. The petitioner herein then appealed to the Court of Appeals of the State of New York, which affirmed the order of the Appellate Division, i.e., under the judgment or order of the Court of Appeals it is likewise no longer necessarily impossible for the State to prosecute the indictments forward to a conviction.

It is thus true that the judgment or order of the Court of Appeals here sought to be reviewed does not finally dispose of the subject matter, i.e., it does not finally dispose of the criminal prosecution under the indictments involved. But it is believed that this is not the test of "finality" for the purpose of this Court's certiorari jur-

isdiction in the present instance. Justice Rinaldi's order of suppression did produce a result of finality in view of the New York legislation and practice previously referred to (Code Crim. Proc. §518-a), and it would not seem that the subsequent appellate modifications which revived a practical possibility of continuing the prosecution under the indictments can alter the legal or jurisdictional significance of the fact that petitioner did at one stage have what amounted to a final judgment in his favor (Justice Rinaldi's suppression order), and that now the highest State appellate court has rendered a final judgment depriving petitioner of the benefits of the lower Court's final judgment which, if it had not been modified on appeal, would have terminated the criminal prosecution.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), since the petitioner is claiming rights, privileges or immunities under the Fourth Amendment (unreasonable search and seizure), the Fifth Amendment (self incrimination) and the Fourteenth Amendment (due process of law) of the Constitution of the United States, and under 47 U.S.C. §605; and since there is necessarily drawn in question the validity of a State statute (N.Y. Code Crim. Proc. §813(a)) on the ground of its being repugnant to the Constitution of the United States, and to 47 U.S.C. §605 as given supremacy by Article VI of the Constitution of the United States.*

---

* Our above suggestions as to jurisdictional finality on the instant record make it appropriate to add the following: An earlier stage of this litigation (i.e., of the proceedings by petitioner Cohen seeking suppression of evidence obtained by wiretap and search) was before this Court in *Cohen v. New York*, 375 U.S. 985 (Oct. Term 1963, No. 640), cert. denied. In the latter proceeding we called attention to the suppression proceeding, then concurrently pending, which has now eventuated in the present petition for certiorari, and we noted the jurisdictional problems

Questions Presented

1. Where State Courts in an abortion prosecution have voided a search of a physician's office on Fourth Amendment grounds and have ordered the product of the search suppressed for use as evidence in the abortion prosecution; and where the local police prior to the search had maintained at the same office premises a telephone wiretap authorized by ex parte Court order under permissive State wiretap legislation; and where the police claim to have lost or discarded important records taken in the search which would have disclosed which sources of evidence (names of female patients of the physician) for use at the abortion trial came from the voided search and which came from the wiretap; and where the State Court of first instance which conducted the hearing on the motion to suppress the product of the search and the wiretap has ordered suppression of both such products on the ground *inter alia* that the evidentiary sources obtained from the voided search and from the wiretap were inextricably interwoven or intermingled; and where the State appellate courts in reviewing the suppression order have not ruled on the latter issue of intermingling, have agreed that the search was bad, but have held that the wiretap was lawful—does vindication of the Fourth Amendment rights acknowledgedly violated by the *search* require suppression also of the intermingled *wiretap*-obtained evidence, lest otherwise, in the particular circumstances presented, the Fourth Amendment rights be indirectly but effectively prejudiced?

---

which at that time remained unmatured but are now believed to be mature for consideration by this Court in the instant proceeding. See Pet. Cert., pp. 2-3, 5-19, *Cohen* v. *New York*, Oct. Term 1963, No. 640, cited *supra*.

2. Assuming that the New York State permissive wiretap legislation (N.Y. Code Crim. Proc. §813-a) which allows what we may term "searches" in the form of wiretaps upon a showing of "reasonable grounds" is not in conflict with any Federal constitutional or statutory provision, and treating the "reasonable grounds" provision of the State statute as equivalent to Fourth Amendment "probable cause" (evidently so construed by the State Courts), were the police affidavits used to obtain the ex parte wiretap order in this case adequate by Fourth Amendment standards in view of failure to establish reliability of the informer, among other Fourth Amendment defects?

3. If the wiretap affidavits be deemed to have met the test of "probable cause", then, reaching the question of constitutional validity of the statute, is the New York permissive wiretap statute (N.Y. Code Crim. Proc. §813-a) unconstitutional under the Fourth Amendment as authorizing a "general search" or search for "mere evidence" of crime (including "future crime") and not solely for fruits or instrumentalities of crime?

4. Can any State statutorily permitted wiretapping be constitutional under the Fourth and Fifth Amendments and 47 U.S.C. §605?

5. Did the overall conduct of the police in investigating the alleged abortion activities of petitioner—which police conduct included an egregiously high-handed and admittedly unconstitutional search, massive wiretapping for which ex parte State judicial permission was obtained on the basis of information from basely discreditable and favor-seeking-motivated informers whose information was moreover almost all hearsay, loss and spoliation of essential

records seized in the unlawful search, manifestly unconvincing police testimony at the suppression hearing to the effect that the wiretap rather than the search produced the essential leads for the abortion prosecution, and brutally coerced subjection of a main female prosecution witness to compulsory gynecological examination in the immediate aftermath of her alleged abortion by petitioner as she was arrested on leaving petitioner's office (the lady in question moreover having denied she was aborted and the hospital report being negative for abortion)—fall below Fourth and Fourteenth Amendment standards for the investigation and prosecution of crime?

Constitutional and Statutory Provisions Involved

The case involves Article VI (supremacy clause), and the Fourth (unreasonable search and seizure), Fifth (self-incrimination) and Fourteenth (due process of law) Amendments of the United States Constitution. It also involves §605 of the Federal Communications Act (U.S.C. Title 47). It also involves the following New York State statutes: Code Crim. Proc. §518-a, §§813-a, 813-c, 813-d and 813-e. These Federal and State statutory provisions are quoted in Appendix J hereto, *infra*.

Statement of the Case and of How the Federal Questions are Presented

Petitioner, a licensed physician of the State of New York, was indicted for abortion (R. 7-20).* He moved in the Supreme Court of New York, Kings County, to suppress

* "R. " refers to the printed Record On Appeal in the Court below, nine extra copies of which are filed herewith.

the use as evidence of products of a search of his home and office conducted during the middle of the night of September 2-3, 1960, and the products of a telephone wiretap of his office conducted for some months prior thereto under the authority of an ex parte Court order issued pursuant to N.Y. Code Crim. Proc. §813-a (R. 21). After extensive hearings (R. 63-556), the motion to suppress was granted, on the grounds *inter alia* that the search violated the Fourth Amendment, the wiretap permissive order was based on affidavits which were inadequate under the "reasonable grounds" requirement of the statute, and the evidentiary products (especially the names of female patients of petitioner) of the search and the wiretap were so inextricably intermingled or interwoven that it was necessary to suppress the use of the testimony of all of the female complaining witnesses named in the indictments; in this last connection the Supreme Court, Kings County (Rinaldi, J.), also noted that the police had lost, misplaced and destroyed records obtained in the search which were indispensable for determining which evidentiary sources came from the search and which from the wiretap, and it strongly disparaged the probativeness of the police testimony on this subject (R. 563-571; Appendix D hereto, *infra*).

The New York State statutes permit appeal by the State (the People) from an order of suppression of the instant type if the State files with the Appellate Court a statement asserting that, if the State is deprived of the use of the suppressed evidence, the prosecution cannot be carried forward to a conviction (N.Y. Code Crim. Proc. §518-a). The State filed such a statement in this case as a condition of the right to appeal to the Appellate Division, Second Department, Supreme Court of New York.

The Appellate Division, in the appeal by the State from the order of suppression, approved the lower Court's (Rinaldi, J.) invalidation of the search; it disapproved Justice Rinaldi's determination that the wiretap affidavits were insufficient, but, be it noted, this ruling of the Appellate Division was stated in only conclusory words; it deleted Justice Rinaldi's order of restraint or suppression as to the use of the names of the females mentioned in the indictments, but it did so without (so far as appears) considering the issue of whether those names came from the wiretap, or from the search, or interminglingly from both the wiretap and the search; it did not reach the issue of loss or spoliation of documents by the police; it also did not reach the issue of the overall police conduct in relation to the search and the wiretap taken together; and it did not reach any constitutional issue of wiretapping, i.e., either as regards the constitutionality of Code Crim. Proc. §813-a in itself, or as to the constitutionality of *any* form of State legislation for permissive wiretapping by ex parte Court order (R. 576-579; Appendix C hereto, *infra*).

Petitioner appealed, by leave, to the Court of Appeals of the State of New York (R. 573-575), from the order of the Appellate Division (R. 576-577). The Court of Appeals affirmed the order of the Appellate Division without opinion (Appendices A and B hereto, *infra*). Judge Fuld of the Court of Appeals dissented, in the following memorandum in which Chief Judge Desmond concurred (Appendix B hereto, *infra*):

> "I adhere to the views I expressed in People v. Dinan (11 N Y 2d 350, 357)—that evidence should be excluded if obtained by interception of telephone communications in contravention of the Federal Commu-

nications Act and, accordingly, vote to reverse and to order a new trial."

The Federal questions were duly preserved by petitioner and, as seen from our recitals, *supra*, were necessarily passed upon or decided in each of the three State Courts below. The Federal Constitutional points urged by petitioner in the motion-to-suppress proceeding before the Supreme Court of New York, Kings County (Rinaldi, J.), are set forth in Appendix E hereto, *infra* (quoted from the "Summary of Defendant's Points" in the typewritten memorandum of law before the latter Court).

In the Appellate Division the within petitioner (as respondent or appellee in that appeal) urged the Federal Constitutional points which are set forth in Appendix F hereto, *infra* (taken from the printed "Respondent's Brief" in the Appellate Division).

The State (as appellant) urged in the Appellate Division the points set forth in Appendix G hereto, *infra* (quoted from the printed "Appellant's Brief" in the latter Court).

In petitioner's appeal to the Court of Appeals he urged the Federal Constitutional Points which are set forth in Appendix H hereto, *infra* (quoted from the printed "Appellant's Brief and Appendix" in the latter Court).

The State (as respondent or appellee) in the Court of Appeals urged the points which are set forth in Appendix I hereto, *infra* (quoted from the "Respondent's Brief" in the latter Court).

Reasons for Granting the Writ

I

All three of the Courts below were evidently in agreement that the search violated the Fourth Amendment. Since no guidance or expression was offered by the Appellate Division or by the Court of Appeals to deal with the problem of the express finding and ruling by the Supreme Court, Kings County, concerning the intermingled character of the evidentiary products of the search and the wiretap,* the modification on appeal which leaves the State free to use the evidence of the female complaining witnesses stands in this record not merely as a ruling by the State appellate courts below that the wiretap-obtained evidence may be used, but also it is susceptible of being applied (erroneously, we contend) as an effective ruling by the latter Courts that such wiretap evidence may be used irrespective of the consequences that this may work in the way of allowing use at the trial of concededly unconstitutionally obtained *search* evidence.

The exhaustive proceedings before the Supreme Court, Kings County, in the hearing on the motion to suppress, were so complete (R. 63-556) as to afford little if any realistic expectation that there will ever be judicially unraveled in this case the interweaving of the search-obtained evidence and evidentiary leads as distinct from those obtained through the wiretap.

This case presents, therefore, in an unusual (but likewise unusually compelling) way a problem as to the effec-

---

* As noted, so far as appears the unconstitutional search was the source of the entirety of the evidentiary leads to the names of Dr. Cohen's female patients.

tive preservation of undisputedly applicable Fourth Amendment sanctions. By a process of amorphous absorption of the undisputedly unconstitutional search products into the allegedly legal wiretap products, the admittedly proper and necessary constitutional quarantine against the search products in this case is sure to be breached.

Nor is it to be thought that the present case may be rare or even unusual in these last mentioned respects. It is virtually standard operating procedure for police to follow up a wiretap or electronic eavesdrop with a search and seizure where prosecution is contemplated. The intriguing procedural device implicit in the not-too-coherent but impingingly predictable rulings of the State appellate courts in this case, a device whereby unconstitutional Fourth Amendment searches are to be "rehabilitated" by "constitutional" State wiretaps, should receive the attention of this Court, the present case being a suitable vehicle for this purpose through the granting of certiorari.

II

The Supreme Court, Kings County (Rinaldi, J.), specified in an impressively detailed manner (*infra*) the defectiveness of the wiretap affidavits under the Fourth Amendment test of "probable cause" * (R. 564-568; Appendix D hereto, *infra*). The Appellate Division ruled otherwise, but without any explanation or statement of reasons (R. 576-579; Appendix C hereto, *infra*); and the Court of Ap-

* The "reasonable grounds" provision of *N.Y. Code Crim. Proc.* §813-a is undisputedly the equivalent of "probable cause," and it has been so treated in this litigation. See also *People* v. *Grossman*, 45 Misc. 2d 557, 257 N.Y.S. 2d 266 (S. Ct. Kings Co. 1965). Cf. *Draper* v. *United States*, 358 U.S. 307, 310 fn. 1.

peals likewise (writing no opinion) did not explain why it affirmed the order of the Appellate Division (Appendices A and B hereto, *infra*).

The ex parte wiretap application and supporting affidavits appear at R. 21-29. The wiretap order was issued on affidavits by Assistant District Attorney Kenneth J. McCabe and two informants, Alvin G. Rosen and Audrey Saltzman. Let us begin by summarizing Justice Rinaldi's detailed analysis of those affidavits (it being remembered, again, that the Appellate Division and the Court of Appeals in reversing Justice Rinaldi on this issue gave no reasons for so doing).

Justice Rinaldi noted (R. 568) that Rosen and Saltzman were under investigation in connection with certain forgery, burglary and arson charges which in no way involved Dr. Cohen; that in the course of the investigation Rosen, "in an obvious attempt to curry favor with the police", volunteered to them that Dr. Cohen was committing abortions; that Rosen's information (described, *infra*) used in the supporting affidavits for the wiretap order resulted in supporting affidavits "based to a great extent on hearsay twice removed and on events which had transpired a long time prior thereto"; that "There is also a serious question" as to the sufficiency of the previous police dealings with Rosen such as would justify the police in depending upon the reliability of his information; that the question of informer reliability is "of paramount importance" and facts must be brought to the attention of the Court to whom ex parte application was made to satisfy it of such reliability; that Rosen and Saltzman "were themselves deeply enmeshed" in a major criminal ring and

while they had accurately confessed their own crimes and those of their accomplices in which they had already been implicated, they had never previously informed the police as to any crimes in which they themselves were not implicated; that "the police had no criteria to judge their reliability concerning information as to this defendant" and "Vouching as to their reliability had no basis in fact"; that the authorities impose "strict standards of reliability of informers"; that although these authorities involve search and seizure situations, "the same standards, at the least, must be applied to wiretap orders"; and that "The Court cannot find anything in the original wiretap affidavits which meet [sic] the foregoing tests as to * * * 'reasonable grounds' and 'reputation for reliability' "

The above summarized factual findings of Mr. Justice Rinaldi are fully supported by the record. Thus, the affidavits in support of the wiretap order revealed the following:—Assistant District Attorney McCabe's affidavit (R. 23-25) contains all of the allegedly material information, the affidavits of the informers Rosen and Saltzman being merely conclusory confirmations of Mr. McCabe's affidavit (R. 26-29), and stating that the information given by each of the informers to the police was their own "experience" and from conversation Saltzman allegedly had with one Irma Wertheimer. The McCabe affidavit averred that it was made *upon information and belief* and upon the annexed affidavits of Rosen and Saltzman, and that the sources of the information and the grounds of the belief were those "annexed affidavits, *the records and files of his office and information supplied to deponent by the detec-*

tive's squad attached to the office of the District Attorney, Kings County" (Emphasis added).*

The "information" recited in the McCabe affidavit was that Irma Wertheimer in July or August of 1958, being pregnant, "obtained information" that a criminal abortion could be performed upon her by the within Dr. Cohen; that shortly thereafter she went to Dr. Cohen's office with her husband Milton Wertheimer and had an abortion done for $500; that in July or August of 1959 Irma Wertheimer, being again pregnant, this time from intercourse with her boyfriend Constantine Triges, she and Triges went to Dr. Cohen's office where they paid him $400. for performing an abortion; that again in October or November 1959 Irma and her boyfriend Triges went to Dr. Cohen's office where they paid him $400. for performing another abortion; that during the first week of February 1960 Audrey Saltzman, believing herself pregnant, consulted with her girlfriend Irma Wertheimer regarding Dr. Cohen, Audrey and Alvin G. Rosen went to Dr. Cohen's office, Rosen had $750. with him, Dr. Cohen examined Audrey and advised she was pregnant, he demanded $900. to perform an abortion, as Rosen only had $750. with him and as Dr. Cohen wanted the entire $900. they left his office with the intention of returning when they had the rest of the money, but thereafter Audrey's menstrual cycle came about naturally and they had no rea-

---

* Our italicized emphasis in the text immediately above is with a view to our discussion *infra* of one of the prime flaws in the wiretap affidavits, namely, that Mr. McCabe himself got his "information and belief" from police officers, not directly from any informant; see also our discussion *infra* as to the lack of any showing in this record that any affiant, informer or even any police officer was personally examined by the Judge who issued the original wiretap order.

son to return. Mr. McCabe's affidavit, which was sworn to July 27, 1960, concluded that by reason of the aforesaid there was "reasonable cause to believe that evidence of the crime of criminal abortion may be obtained if telephone messages were to be intercepted" on Dr. Cohen's office telephone. R. 23-25.

No affidavit was obtained from Irma or Milton Wertheimer, and the affidavits do not contain one word that the Wertheimer information was verified by anyone (R. 25-29).

The police testimony in the hearing before Justice Rinaldi revealed that the hearsay character of the affidavits was even more attenuated than appeared from the affidavits themselves because the police evidently got their whole story from Rosen rather than from his girlfriend Miss Saltzman, so that all of the alleged police information about Miss Saltzman's friend Irma Wertheimer (from whom no affidavit was obtained) came to them by *triple* hearsay (R. 119-132, 151-162, 241-247).

Indeed, since Assistant District Attorney McCabe in turn got his information from an unspecified police or detective source, or for all that appears, from *a chain* of such sources, the case is one of *at least quadruple* hearsay. The situation thus presented involves a hearsay attenuation too egregious to be salvageable under even the liberalized treatment of *United States* v. *Ventresca*, 380 U.S. 102, where the Court re-examined the problem of hearsay communications as among Government officers in conducting a search or in applying for a search warrant.

It is evident from the above why Justice Rinaldi concluded that the affidavits were insufficient. The affidavits contain nothing concerning the reliability of Rosen and

Saltzman as informers concerning abortion or any other criminal activity—and the record in this proceeding is barren of any indication that any further information on this subject beyond the affidavits themselves was supplied to the Judge who granted the application for the ex parte wiretap order. The affidavits also show on their face that all of the alleged information concerning Irma Wertheimer was hearsay to Rosen and Saltzman and at least double hearsay to the police and the District Attorney. And as for the item in the McCabe affidavit about Rosen's and Saltzman's own alleged visit to Dr. Cohen's office, this would scarcely rank as "reasonable grounds" since all that allegedly occurred was a conversation about an abortion, but no abortion.

Besides all of this, the alleged happenings mentioned in the McCabe affidavit long antedated the wiretap application, which was made at the end of July 1960. The alleged Irma Wertheimer incidents were in the summer of 1958, the summer of 1959 and the fall of 1959, and the inconclusive alleged Saltzman-Rosen incident was six months prior to the wiretap application.

We pause to emphasize this last noted circumstance that the alleged "reasonable grounds" adduced in Mr. McCabe's affidavit were so remotely prior in time to the wiretap application. As seen, Mr. Justice Rinaldi remarked that the application was based "on events which had transpired a long time prior thereto" (R. 568). The full implications of the constitutional offensiveness of this sort of inordinate time lag in applications for warrants which are in the nature of search warrants, can perhaps be best

appreciated in connection with our discussion *infra* of the problem of a search for "evidence", as distinct from a search for property. But it is pertinent also at this juncture to say a few additional words on this subject of the time lag in the present case. It is fundamental, in the general law of search warrants, that this kind of stale allegations cannot support an application for a search warrant. Cf. the Federal decisions which deal with this staleness factor in connection with arrests and searches, e.g., *United States* v. *Joines*, 258 F. 2d 471 (C.A. 3 1958), cert. denied 358 U.S. 880; *Dailey* v. *United States*, 261 F. 2d 870 (C.A. 5 1958), cert. denied 359 U.S. 969; *Carlo* v. *United States*, 286 F. 2d 841 (C.A. 2 1961); *Hobson* v. *United States*, 226 F. 2d 890 (C.A. 8 1955); *Wrightson* v. *United States*, 222 F. 2d 556 (C.A.D.C. 1955); see also the dissenting opinion by Judge Waterman, collecting the authorities, in *DiBella* v. *United States*, 284 F. 2d 897 (C.A. 2 1960), reversed on other grounds 369 U.S. 121.

Necessarily presented on this record also is the familiar Fourth Amendment point—prominently stressed by the New York Court of Appeals itself in its recent decision in *People* v. *McCall*, 17 N.Y. 2d 152—that no showing was made (before Justice Rinaldi) that any affiant or any other person appeared for examination before the Judge who granted the original wiretap order. Thus there was, apparently no opportunity, by judicial means, as contemplated by *N.Y. Code Crim. Proc.* §813a (and by the Fourth Amendment), to test the factual foundations of this manifestly shaky (at best) wiretap application. The order allowing the wiretap (R. 21) referred only to the "annexed affidavits", not to any examination or personal appearance of anyone. Had there been any such examination or appear-

ance it would presumably have become part of the record basis of the wiretap order, as the Court below pointed out in *McCall, supra.*

On this record, how can it be said that the State showed before the Judge who signed the wiretap order, that the police were in possession of the constitutionally required quality of "reliable" information to justify them in averring "that there is reasonable ground to believe that evidence of crime [abortion] may be * * * obtained" by the desired wiretap? It hardly seems necessary to re-emphasize the exacting standards in regard to adequate affidavit demonstration of the "reliability of the informer" at the time of the application for the "warrant". E.g., *Draper* v. *United States,* 358 U.S. 307; *Jones* v. *United States,* 362 U.S. 257; *Henry* v. *United States,* 361 U.S. 98.

Under the rule of these controlling Federal cases it was obligatory for the State here to demonstrate in the original wiretap affidavits the "reputation for reliability" of Alvin Rosen and Audrey Saltzman, and to include in those affidavits "some factual information independently corroborative" of the Rosen-Saltzman information (*United States* v. *Ramirez,* 279 F. 2d 712, 715 (C.A. 2, 1960)). Justice Rinaldi correctly concluded that he "cannot find anything in the original wiretap affidavits which meets the foregoing tests."

Certiorari is justified, indeed required, to bring about in this case, on the high authority of this Court, a re-assertion of the standards of the Fourth Amendment "probable cause" for "search" affidavits. *A fortiori* those standards are needed in connection with the form of "search" which is connoted by the peculiar "search" activities under State permissive wiretap legislation, as is the case here.

III

If the wiretap affidavits in the present case be deemed to have met the test of "probable cause", there is then necessarily reached the question of the validity of the New York State permissive wiretap legislation (N.Y. Code Crim. Proc. §813-a).

But for the contrary conclusion of the Appellate Division and the Court of Appeals, it would have seemed unnecessary, in view of the utter insufficiency of the affidavits in point of their probative quality (hearsay and staleness) and their failure to establish reliability of informers, to discuss other legal insufficiencies of the affidavits. But as it is, there are additional points for discussion. Is the New York State eavesdrop statute (Code Crim. Proc. §813-a) unconstitutional as offending against the ban against "general searches," also termed "searches for mere evidence"? Applying such test of constitutionality to the facts of the case, do the affidavits show that what was contemplated was a search for "mere evidence"? Even if the statute is constitutional in allowing searches for "mere evidence", is there anything in the affidavits looking to discovery of "evidence" of any past-committed or currently-being-committed abortion as distinct from *future* crime?

There are two familiar broad categories of analytical disjunction in the general law of search and seizure which elucidate the above questions, namely, (1) the disjunction as between "past" *versus* "present" *versus* "future" crimes, and (2) the disjunction as between "fruits and instrumentalities" of crime *versus* "mere evidence" of crime. It is elementary that there can exist no "probable cause" to arrest or to search for mere "future" crimes,

and that the entire corpus of the law of "probable cause" does not go beyond "past" or "present" crimes. E.g., *Brinegar* v. *United States*, 338 U.S. 160, 175-176, where, in defining "probable cause", the Court spoke of knowledge and information "sufficient in themselves to warrant a man of reasonable caution in the belief that an offense *has been* or is *being* committed" (emphasis supplied).

In other words, it is of the very essence of the constitutional law of unreasonable search and seizure, as such would sensibly apply to wiretap "searches," that wiretapping may constitutionally be permitted (if at all) only upon a showing which meets the tests of "probable cause" that a crime has been committed or is being committed.

Even so, however, the problem above suggested continues unresolved, *viz.*, that in regard to any such showing of a past-committed crime it is impossible to see how a wiretap could produce anything except supposedly confirmatory "evidence" of such alleged commission of the past crime; and this in turn means not only that there would have to be a showing of a reasonably grounded expectation that such confirmatory evidence would be obtained by wiretapping, but also it means that the problem heads one directly into the extremely disturbing constitutional question above mentioned as to whether *any* search *for mere evidence* (as distinct from fruits and instrumentalities of a crime) may be permitted. See Chief Judge Desmond's separate opinion in the recent *McCall* decision, *supra*, where the Chief Judge said:

> "* * * And there is another unanswerable constitutional objection to wire tapping and to the use of wire tapped evidence. Before the Fourth Amend-

ment (see *Entick* v. *Carrington*, 1765, 19 Howell's State Trials 1029) it was the law, and it has always been the law under the Fourth Amendment (*Gouled* v. *United States*, 255 U.S. 298, 309; *Boyd* v. *United States, supra*) that even a search under a warrant is unlawful, 'if used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding,' and that no search is valid except for the seizure of specific property, not evidence. Wire tapping by its very nature can never be anything but a search for evidence. Our wire tapping statute (813-a Code Crim. Proc.) as well as Art. 1, Sec. 12 of the State Constitution specifically authorizes the tapping of telephones to obtain 'evidence of crime' and the very affidavits on which the wire tap orders in this case were granted allege that the wire tapping is to be done to obtain 'evidence of crime'. I cannot in conscience depart from the views which three of us expressed in dissent in *People* v. *Dinan*, 11 N.Y. 2d 357. All wiretapping violates both the Fourth and Fifth Amendments to the Federal Constitution."

The leading case which forbids a search for "mere evidence" is *Gouled* v. *United States*, 255 U.S. 298. See also the opinion of Mr. Justice Brennan, dissenting, in *Lopez* v. *United States*, 373 U.S. 427, where the authorities are collected and discussed.

If a search for "mere evidence" is unconstitutional, then it follows, for our case, that the provision in the eavesdrop statute (N.Y. Code Crime Proc. §813-a) permitting a wiretap upon "reasonable ground to believe that *evidence* of crime may thus be obtained" is unconstitutional if such

be construed to allow wiretapping for any purpose which would not be strictly analogous to a search for "fruits and instrumentalities" of the crime or crimes of the categories involved in the instant indictments.

Discussion of the problem of a "search for mere evidence" usually touches upon the Fifth Amendment (self-incrimination) as well as upon Fourth Amendment search and seizure. This was Chief Judge Desmond's conclusion in his separate opinion in *McCall*, quoted *supra*. The same unreasonable act of search which violates a citizen's right of privacy under the Fourth Amendment may and usually does simultaneously violate his privilege against self-incrimination under the Fifth Amendment.* *Boyd* v. *United States*, 116 U.S. 618; *Gouled* v. *United States*, 255 U.S. 298. See also, again, Mr. Justice Brennan's dissent in *Lopez* v. *United States*, 373 U.S. 427, bringing the discussion of this theme down to more recent date, and noting that the theme had been reaverred in *Mapp* v. *Ohio*, 367 U.S. 643.

It needs no extended argument to show that it is above all in the area of telephone wiretapping and other electronic eavesdropping that this interplay between unreasonable invasion of individual privacy and breach of the privilege against self-incrimination tends naturally to achieve its most vicious and intense form.

And this last, in turn, brings us finally to what is perhaps the profoundest constitutional infirmity in any system of court-permitted wiretapping or electronic eavesdropping.

---

* *Malloy* v. *Hogan*, 378 U.S. 1, has made the law of Fifth Amendment self-incrimination applicable to the States.

We refer to the "general search" character which must inevitably attach to *any* act or situation of electronic eavesdropping. Unlike a search under a search warrant where the things to be seized are explicitly described (as required by the Constitution), the eavesdropping electronic device conveys to the recording instrument or to the human monitor-auditor everything that is said on the eavesdropped telephone or in the eavesdropped room space; plainly this amounts to a "general search" in the constitutionally forbidden sense.

Applying the above-described "mere evidence" tests to the within affidavits, we find that the Rosen-Saltzman information pertained to three alleged acts of abortion on Irma Wertheimer (all hearsay, as noted) and one inconclusive abortion interview, all had in the remote past. How could a *post-factum* wiretap of Dr. Cohen's telephone lead to "evidence" of such supposed past-committed abortion? This hoped-for wiretap result could come about only if the informer-affiants swore that he, or she (or both of them), were expecting to be in telephone communication with Dr. Cohen or his office in connection with some aftermath developments relating to some alleged past-committed abortion. No such indispensable averment was made in the papers filed with the application for the ex parte wiretap order.

It is indisputable then, again, that no affidavit showing was here made to justify the conclusion that "evidence" of alleged past-committed or present acts of abortion would be obtained. And a mere showing of a supposed past-committed abortion, especially abortions that are remote in relation to the time of application for a wire-tap order, would not in itself constitutionally justify the conclusion

that "evidence" of such past, or present, much less *future*, abortion activity would be turned up by a wiretap.*

IV

The dissenting opinion in this case written by Judge Fuld of the Court of Appeals, concurred in by Chief Judge Desmond, favored a disposition on the basis of outright constitutional invalidation of all State wiretapping in obedience to §605 of the Federal Communications Act (47 U.S.C.). In view of this Court's own continuing alertness to the problem of the conflict between cases such as *People* v. *Dinan*, 11 N.Y. 2d 350 and *Benanti* v. *United States*, 355 U.S. 96—see also the granting of certiorari in *Osborn* v. *United States*, 382 U.S. 1023, 15 L. Ed. 2d 538—we shall refrain from burdening the Court with further argument in support of the suggestion that this case affords a proper occasion for re-examining the Federal constitutionality of State wiretapping under the tests of the Fourth Amendment and of §605 of the Communications Act (supremacy clause).

---

* We respectfully suggest that *Gouled* v. *United States*, 255 U.S. 298, the leading authority on the "mere evidence" issue, is still the law, notwithstanding the scholarly ratiocinations in the recent New Jersey and California decisions—*State* v. *Bisaccia*, 45 N.J. 504, 213 A. 2d 185; *People* v. *Thayer*, 47 Cal. Rptr. 780, 408 P. 2d 108—which came to this Court's attention in *Schmerber* v. *California*, —— U.S. ——, 16 L. Ed. 2d 908, 918 fn. 10, and which doubtless also were before Chief Judge Desmond and Judge Fuld (the dissenting Judges in the Court below in the instant case) when they dissented in another case decided on the same day as the instant case, *People* v. *Berger*, 18 N.Y. 2d 638, 640, involving the room "bugging" type of electronic eavesdropping (we are advised that the latter *Berger* case is about to be presented to this Court by petition for certiorari).

V

The judgment below should be reviewed in several other aspects relating to both the wiretapping and the search, i.e., viewing the overall conduct of the police in this case in constitutional terms, the conduct of the police officers fell far below the Fourth Amendment and due process standards established by this Court under the test of "the total atmosphere of the case." *United States* v. *Rabinowitz*, 339 U.S. 56, 66 (Frankfurter, J., dissenting). See also *Rios* v. *United States*, 364 U.S. 253, 255 ("a particular evaluation of the conduct of the officers involved").

The Court customarily examines the record facts in search-and-seizure cases in this comprehensive manner. *E.g., Henry* v. *United States*, 361 U.S. 98; *Jones* v. *United States*, 362 U.S. 257; *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344.

Let us note the several ways in which the conduct of the police officers in this case violated the above standards:

Spoliation of Evidence and Improper Keeping of Records

(1) Perhaps the most notable instance in the epidemic of "loss", "misplacement" or destruction of documentary evidence on the part of the police in this case is that of Dr. Cohen's office desk diary calendar. Detective Toolan, describing the search activities at Dr. Cohen's office on the night of September 2-3, 1960 said that Policewoman O'Meara examined the calendar or diary on Dr. Cohen's desk and that she "found a name that meant something to her from her investigation up to that point, and she took that with her" (R. 117); also that "during the course of

the entire time that we were in the doctor's office, Gloria O'Meara was behind the desk and she was looking through patients' cards and through that calendar diary that I referred to" (R. 118). Chief Policewoman Melchionne said "I have heard that they did take a diary and that same has been unavailable at this point", "misplaced" (R. 171). Toolan also said that he does not know where the calendar diary is now (R. 148). Policewoman Munroe testified that Miss O'Meara told her she had looked at the calendar diary in Dr. Cohen's office during the search (R. 351).

Miss O'Meara herself stated that this calendar had been missing since sometime in 1961 (R. 393), she had taken it to Assistant District Attorney Panzarella (R. 395), after that she had seen it around for several months but she had since searched for it and could not find it (R. 395-396).

The People attempted, through the testimony of Miss O'Meara, to "rehabilitate" this missing calendar or diary by low-quality secondary "evidence" of Miss O'Meara's verbally stated "recollections" of the contents of the diary and by her alleged notes (as to which see further *infra*), to all of which a defense objection was sustained (R. 393-396). The admission by Miss O'Meara that the name of at least one complainant was found in the diary highlights its importance and the undoubted use of the diary in the investigation of Dr. Cohen after his arrest which led to the indictments herein. As a matter of fact, the District Attorney offered to concede that all of the police efforts, including the wiretapping, led to only one complainant, Esther Richards (R. 337-338). Since the diary was the only record taken from the defendant's office despite the examination of the patients' index cards as well, the infer-

ence from this theory of the District Attorney is overpowering that the diary was not only useful to the police but also, that the diary supplied the leads to the other complainants. Furthermore, Miss O'Meara destroyed relevant notes relating to her examination of the diary and the patients' index cards (R. 487, 489, 495-496).

In *Campbell* v. *United States*, 373 U.S. 487, and in the earlier decision in the same case in 365 U.S. 85, the Court indicated that in a proper case attention must be given to the question of what sanctions would be appropriate against the Government if it developed that "Jencks Act" (18 U.S.C. §3500) notes which were producible had been destroyed and no copy had survived. The Court also intimated that the sanctions in such a situation would be those under sub-section "d" of the Jencks Act, which provides, *inter alia*, that "The Court shall strike from the record the testimony of the witness" as to whom a producible statement is not delivered to the defendant. The *Campbell* cases, *supra*, have even left open the question of applying such sanctions against the Government where the destruction of the document involved may have been done in good faith. As noted by Circuit Judge Aldrich in his concurring opinion in *Campbell* v. *United States*, 303 F. 2d 747, 751 (C.A. 1 1962), " • • • the Supreme Court indicated the possibility of consequences unfavorable to the Government even if the destruction were innocent." The Courts of New York State have adopted the "Jencks" policy (*People* v. *Rosario*, 9 N.Y. 2d 286; *People* v. *Agron*, 10 N.Y. 2d 130), but they have not applied that policy here.

The New York Courts also recognize the need to afford some appropriate remedy to a party whose property seized

in an illegal search has been destroyed. *Metallic Flowers* v. *City of New York*, 4 A.D. 2d 292, 164 N.Y.S. 2d 227, 234 (1st Dept. 1957), mentioning as among the available remedies replevin and an action for damages. Obviously these latter suggested remedies were not adequate in our case. See also *People* v. *Strollo*, 191 N.Y. 42 (1908); *People* v. *Bell*, 21 A.D. 2d 660 (1964); *People* v. *Genova*, 15 A.D. 2d 44 (1961), where the loss of trial exhibits by the People which are essential for appellate review requires reversal of a conviction and dismissal of the charges against the defendant. How much more aggrieving is the loss of essential documentary items *before trial!*

Further analogous light is shed on the instant situation by the familiar authorities which require the vitiating of a conviction in a criminal case when evidence has been suppressed by the prosecution. *E.g.*, *Brady* v. *Maryland*, 373 U.S. 83.

That the precise issue here presented in regard to the loss or destruction of petitioner's office calendar or diary does not appear to have arisen in any previous proceeding for suppression of illegally seized evidence, should not result in depriving petitioner of a remedy. The granting of our motion to suppress by Justice Rinaldi was justified on the ground, without more, of the People's negligent or otherwise improper conduct in losing Dr. Cohen's office calendar or diary. Such was entirely in keeping with the spirit of the Fourth Amendment tests above mentioned whereby the Courts are called upon to consider "the total atmosphere of the case" and to make a "particularized evaluation of the conduct of the officers involved." The unavailability of the calendar or diary and the destruction

of notes relating to the other facets of the search (i.e., patients' index cards), when taken together with the numerous and important other instances of unfairness and violation of due process on the part of the People's officers in this case, required the granting of our motion to suppress as a means of vindicating the Fourth Amendment standards just mentioned.

(2) Rivalling the "lost" diary item is Policewoman O'Meara's astounding "dot-dash" testimony (i.e., coded notes containing "dot" and "dash" symbols) (R. 477-480), and the manner in which she prepared her notes of the search and the alleged prior surveillance of the defendant's office (R. 845 et seq.). In this branch of the case, the witness' tactical preoccupation seemed to be, at the moment, not to shield what had happened prior to September 2, 1960,* but to shield what happened on and after those days. Miss O'Meara's "dots" were supposed to indicate that a name on her pre-search list was found on a patient's index card or in the diary in defendant's office; a "dash" was supposed to indicate that the particular name on the pre-search list did not appear on such an index card or in the diary (R. 478). What is interesting, therefore, is that in only one instance covered by the questioning on this subject did Miss O'Meara's supposed system of dots and dashes produce an unequivocal or even a coherent conclusion, and in that single instance the name (Basile) is not important for this case (R. 479). Thus, of the names concerning which she testified on her pre-search list, the name Albertino had a dash and an allegedly accidental or inadvertent dot that "looked" to the witness like merely the dotting of the letter "i" (R. 478); the names Holman, Pack and Richards each had both a dot and a dash, of which the witness said (sud-

* The date of the search.

denly amending the supposed meaning of her supposed code) that this meant no index card was found for these names on the pre-search list (R. 478-479).

It is plain to see what this testimony of Miss O'Meara concerning the "dot-and-dash" code and the notes of surveillance was designed to accomplish. Its purpose was to suggest that no information which led to the within indictments was obtained from the patients' index cards or the "lost" diary during the search of September 2-3, 1960.

(3) Other instances of destruction, loss, misplacement or failure to keep records relevant to the issues of the motion to suppress are: (a) Policewoman O'Meara's admitted, unexplained and unexcused destruction of several pages from her memorandum book relating to the crucial happenings of September 2, 1960 (R. 485-489); (b) Miss O'Meara's similar destruction or misplacement of other contemporaneous notes concerning the events of the afternoon of September 2, 1960 which had allegedly been used by her to write up her memorandum book of a subsequent date (R. 489-491); (c) Miss O'Meara's similar admitted destruction of an unknown number of other relevant notes and papers (R. 508-509); (d) the admitted destruction by Detective Malapero of the paper on which he allegedly wrote down the license plate number of the Esther Richards automobile on September 2, 1960 (R. 223-225); (e) the failure of Detectives Toolan and Malapero to have kept any notes or memoranda at all, under direct orders of the District Attorney's office that such omission to keep records should be deliberately done in this case despite police regulations which require the keeping of such notes and memoranda (R. 111, 132-133, 165, 223-225); (f) the admitted

failure of Chief Policewoman Melchionne to make or keep any notes or memoranda concerning this investigation or, especially, concerning her vital conversations with Detective Toolan, despite her testimony that she had not been instructed by the District Attorney not to keep notes or memoranda about this case (R. 178, 211-212)*; (g) the failure of Policewoman Munroe to make or keep any notes or memoranda except those consisting of her typewritten transcripts and lists in regard to the wiretap, despite the testimony of Mrs. Melchionne that her policewomen had not been instructed not to keep notes or memoranda about this case and her testimony that her policewomen did keep their own notes and that she assumes they still have them (R. 178-179, 291, 293-294); (h) the absence from Miss O'Meara's allegedly very complete notes concerning the arrest, of any mention of the defendant's alleged invitation to the police to search his office (R. 498-500).

It is remarkable, in fact uncanny, how the instances throughout this case in which records are missing or claimedly were never made, as well as the instances in which the police notes or the police memories are deficient or flawed and the police veracity questionable, happened to touch the most sensitive areas of the case, *viz.*, the areas which would reveal illegal wiretap-obtained leads or illegal search-obtained leads, and would refute claimed legal evidentiary leads. The police reports which tended to be most "available" were those relating to alleged "surveillance" activities, and those least available related to the wiretap and the

---

* Note the inconsistency as between the Toolan-Malapero testimony and the Melchionne testimony concerning alleged instructions from the District Attorney as to the keeping of notes and memoranda.

search. Most striking, of course, was, again, the marvelous condition of the notes and records of Miss O'Meara, which were helpfully "complete" on points desired by the prosecution and "missing" or incomprehensibly unclear on points desired by the defense.

The combination of all of the above improprieties, deficiencies and official neglects on the part of the People's officers in this case is an important factor, we submit, to be considered in applying the tests of "the total atmosphere of the case" in regard to Fourth Amendment reasonableness (*Rabinowitz, supra*), and of "a particularized evaluation of the conduct of the officers involved" (*Rios, supra*).

The Extraordinary Conduct of the Police In Extracting Alleged Admissions From The Complainant Esther Richards.

In point of sheer luridness in the "total atmosphere of the case," if not of constitutionally prejudicial immediacy and directness of impact upon the petitioner Dr. Cohen himself, the following is perhaps the single most climactic item in this case:

Policewoman Munroe testified that she and Officer Toolan "intercepted" Esther Richards in an automobile on a street in Brooklyn on September 2, 1960, that this woman was subjected to repeated and prolonged interrogation while thus held in police custody, that she was taken to Kings County Hospital, *after her denial that she had been aborted*, and there subjected to a gynecological examination which the hospital doctor found to be *negative for abortion* (R. 278, 282, 327-331), that she was thereafter further interrogated, and was finally taken to the District

Attorney's office for still more interrogation, all of which is alleged to have culminated, after further alleged denials by her, in an admission of an abortion committed by the petitioner (R. 328-330).*

Unless Esther Richards consented to these phenomenal impositions by the police officers—there being nothing in the record to support any such suggestion of consent or waiver (indeed, Miss Richards for a long time denied she was aborted)—it is beyond any need for argument or citation of authority that she was subjected to unlawful arrest and to a barbarously unconstitutional search of her person in the most odiously intimate form imaginable. Cf. *Rochin* v. *California*, 342 U.S. 165, annotated in 96 L. ed. 194 (*"Physical Examination or Exhibition of, or Tests upon, a Suspect or Accused, as Violating Rights Guaranteed by Federal Constitution"*). Esther Richards herself, then, in a proper proceeding would undoubtedly be entitled to suppression of any alleged admission thus extracted from her. It follows also, therefore, incidentally, that the alleged evidence thus secured from Esther Richards was "illegal" in the literal and immediate sense of §249 of New York's own Code of Criminal Procedure ("The Grand Jury can receive none but legal evidence"). *Indeed, by virtue of this latter New York State Statute, the petitioner herein had literal "standing" to object to the Esther Richards item* (and he so urged in the courts below—e.g., "Appellant's Brief" in the Court of Appeals, p. 73).

---

* We may note here that Miss Munroe had no notes of her alleged conversations with Esther Richards (R. 331), this being one more instance of the seemingly convenient unavailability of police notes and memoranda in this case.

In these circumstances, we submit that the usual limitations of "standing" to object to the use of evidence illegally seized from another person (*Jones* v. *United States*, 362 U.S. 257) do not apply, that the petitioner herein had such "standing" to move to suppress the alleged Esther Richards admission, whether or not such alleged admissions was introduced in evidence before the Grand Jury, and that in any event the facts should be taken into account in evaluating the "total atmosphere of the case".

The wrong of the police barbarity here involved cries out for judicial redress of the derivative wrong done to the present petitioner. The issue is one that goes beyond the law of search-and-seizure; it is an issue of constitutional due process because it involves police "conduct that shocks the conscience" and brings into operation the principle "that convictions cannot be brought about by methods that offend 'a sense of justice.'" *Rochin* v. *California, supra,* at 342 U.S. 172, 173.

In *Wong Sun* v. *United States,* 371 U.S. 471, the Court disapproved the use against one person of inculpatory admissions by another person where the latter admissions were obtained in violation of the Fourth Amendment. This ruling in *Wong Sun* is analogously applicable here.

We respectfully submit that the Esther Richards "search" episode impurified so fatally the "total atmosphere of the case" and required so unfavorabble an "evaluation of the conduct of the officers involved" as to have justified on this ground alone the granting of the within motion to suppress in its entirety in order to vindicate the requirements of Fourth Amendment reasonableness.

Further Remarks As To The Relationship Between The Wiretap And The Search.

As noted, the Appellate Courts below did not rule on any of the above described issues as to the overall police conduct, the spoliation or loss of documents and reports, the police brutality towards Esther Richards, or as to any of the grave problems concerning the integral relationship between the wiretap and the search.

It is impossible to see how the Appellate rulings below that the testimony of the females named in the indictment is usable at the trial, can be urged as meaning that the Appellate Courts below "held" that the police got the names of those women from the wiretap rather than from the search. The Courts below did not have before them the wiretap, or any stenographic transcripts thereof, or Dr. Cohen's "lost" diary; and, as seen, Justice Rinaldi found that the names came either from the search or the wiretap and search together.

The Appellate rulings below also present these further anomalies: How could the arrest on September 2-3 be invalid (as the Appellate Division, affirmed without opinion by the Court of Appeals, held it was) if the antecedent wiretaps were valid (as the Appellate Division, again affirmed by the Court of Appeals, also held), i.e., how could the arrest be invalid since it was undisputably based on the alleged Esther Richards happening, and that episode was unquestionably generated by the wiretap which the Appellate Courts below have held valid? And how, furthermore, could the Appellate Division (and the Court of Appeals) approve the order for return of the property seized at the time of arrest in petitioner's home if the ar-

rest was thus generated by wiretap information which, again, the Appellate Division (and the Court of Appeals) found to be legally obtained?

These peculiarities in the structure of the Appellate rulings below require at the very least that—in the event that this Court too should decline to undertake review of the constitutionality of the wiretaps or should uphold their constitutionality—that certiorari should be granted to direct that the matter be remanded for further proceedings to make definitive factual findings as to whether the names of the females came from the search or the wiretap.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

KLEINMAN, GOLD & LANDSMAN
Attorneys for Petitioner
Carl I. Cohen

EUGENE GOLD
Of Counsel

[Appendices follow]

APPENDIX A

Remittitur (Order of Affirmance) of the Court of Appeals of the State of New York

COURT OF APPEALS

STATE OF NEW YORK, ss.:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 7th day of July in the year of our Lord one thousand nine hundred and sixty-six, before the Judges of said Court.

WITNESS,

THE HON. CHARLES S. DESMOND,
Chief Judge, Presiding.

RAYMOND J. CANNON,
Clerk.

REMITTITUR July 7, 1966

FILED Jul 20 1966

2. No. 223 66

THE PEOPLE &c.,
Respondent,

vs.

CARL I. COHEN,
Appellant.

Appendix A—Remittitur (Order of Affirmance) of the Court of Appeals of the State of New York

BE IT REMEMBERED, That on the 9th day of May in the year of our Lord one thousand nine hundred and sixty-six, Carl I. Cohen, the appellant—in this cause, came here unto the Court of Appeals, by Kleinman, Gold & Landsman, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And The People &c., the respondent—in said cause, afterwards appeared in said Court of Appeals by Aaron E. Koota, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Eugene Gold, of counsel for the appellant—, and by Mr. William I. Siegel, of counsel for the respondent—, and after due deliberation had thereon, did order and adjudge that the order of the Appellat Division of the Supreme Court appealed from herein be and the same hereby is affirmed.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said

Appendix A—Remittitur (Order of Affirmance) of the Court of Appeals of the State of New York

Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York

COURT OF APPEALS, CLERK'S OFFICE,
Albany, July 7, 1966.

[SEAL]

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON
Clerk

APPENDIX B

"Memorandum" Report of Decision of New York Court of Appeals (Including Dissenting Opinion of Chief Judge Desmond and Judge Fuld), 18 N.Y. 2d 650

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. CARL I. COHEN, Appellant.

Argued June 2, 1966; decided July 7, 1966.

Crimes—wiretapping—Supreme Court vacated and set aside order authorizing telephone wiretapping of defendant's office telephone, restrained use at defendant's trial of any conversations obtained as result of wiretapping pursuant to said order and any leads, clues and information obtained as result of use of said wiretapping, restrained use at trial of any articles of evidence seized or examined in search of defendant's home and office and any leads, clues and information obtained as result of use of said articles, and also restrained use at trial of testimony of female persons named in specified indictments—Appellate Division modified, agreeing that evidence seized in search had been properly suppressed, but finding that order authorizing wiretapping had been based on sufficient affidavits —order of Appellate Division affirmed.

People v. *Cohen*, 24 A D 2d 900, affirmed.

APPEAL, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered November 29, 1965, which modified and, as modified, affirmed an order of the Supreme Court (DOMINIC S. RINALDI, J.;

opinion 42 Misc 2d 403), entered in Kings County, which, upon motion by defendant, (1) vacated and set aside an ex parte order issued on July 28, 1960 by a Supreme Court Justice authorizing telephone wiretapping of defendant's office telephone, (2) restrained and precluded the District Attorney of Kings County and all police officers of the City of New York from using upon defendant's trial (a) any and all articles of evidence seized or examined by police officers in defendant's home and office on September 2 and 3, 1960 and any and all leads and clues revealed or any information directly or indirectly obtained as a result of the use of said articles of evidence, (b) any and all telephone conversations obtained as a result of telephone wiretapping of defendant's office telephone pursuant to the ex parte order of July 28, 1960 and any and all leads and clues and any information obtained as a result of the use of said wiretapping and (c) the testimony of the female persons named in five specified indictments, and (3) directed the return to defendant of all the property seized from his person and office on September 2 and 3, 1960 and any and all photographs, copies, notes or memoranda of the articles seized or examined. The modification consisted of deleting the paragraphs which vacated and set aside the ex parte order of July 28, 1960 and which restrained and precluded from use upon defendant's trial the telephone conversations and the leads, clues and information obtained as a result of the wiretapping pursuant to said order and the testimony of the female persons named in the specified indict-

ments. The Appellate Division found that the denial of a prior motion by defendant to vacate the ex parte order of July 28, 1960 (see 41 Misc 2d 158) had not been on the merits and, accordingly, did not bar the present litigation; that the affidavits in support of the People's motion for the order authorizing the wiretapping (see 42 Misc 2d 403, 406) were sufficient, but that the search had been conducted without defendant's consent and without a warrant and had not been incidental to a lawful arrest and that, accordingly, evidence seized during it had properly been suppressed. In the Court of Appeals defendant argued, in part, that the affidavits upon which the order authorizing the wiretapping was issued were insufficient and failed to show "reasonable ground to believe that evidence of crime" might be obtained, as required by section 813-a of the Code of Criminal Procedure; that said section was unconstitutional as applied to the present case; that all evidence obtained or derived directly or indirectly from the wiretapping should be excluded as violative of Federal constitutional and statutory prohibitions, and that the wiretapping was inextricably interwoven with the unconstitutional search of September 2-3, 1960.

Eugene Gold for appellant.

Aaron E. Koota, District Attorney (*William I. Siegel* of counsel), for respondent.

Order affirmed; no opinion.

Appendix B—"Memorandum" Report of Decision of New York Court of Appeals (Including Dissenting Opinion of Chief Judge Desmond and Judge Fuld), 18 N.Y. 2d 650

Concur: Judges VAN VOORHIS, BURKE, SCILEPPI, BERGAN and KEATING. Judge FULD dissents in the following memorandum in which Chief Judge DESMOND concurs: I adhere to the views I expressed in *People* v. *Dinan* (11 N Y 2d 350, 357)—that evidence should be excluded if obtained by interception of telephone communications in contravention of the Federal Communications Act, and, accordingly, vote to reverse and to order a new trial.

APPENDIX C

Opinion of Appellate Division, Second Department, Supreme Court of New York, 24 A.D. 2d 900

In a criminal action, the People appeal from an order of the Supreme Court, Kings County, entered March 13, 1964 after a hearing, which (a) granted defendant's motion to suppress certain evidence allegedly obtained as the result of an unlawful search and seizure and as a result of telephone wire-tapping of the defendant's office telephone pursuant to an *ex parte* order of said court, issued July 28, 1960; (b) vacated said *ex parte* order; and (c) precluded the use at trial of any evidence or leads resulting therefrom. The People have filed the statement required by statute (Code Crim. Pro., § 518-a) in order to perfect the appeal from the said order.

Order modified (1) by amending the first decretal paragraph to provide that defendant's motion be granted only to the extent set forth in the third and sixth decretal paragraphs (as hereafter indicated) and (2) by deleting therefrom the second, fourth and fifth decretal paragraphs. Order, as so modified, affirmed.

The defendant, a physician, was charged in five indictments with nine counts alleging the commission of criminal abortions and with one count charging the crime of attempted abortion. His motion to suppress the fruits of a search of his office and to preclude the use of leads obtained through the use of a wiretap on his office telephone was granted (42 Misc 2d 403) after his prior motion to vacate and set aside the original *ex parte* wiretap order had been denied (41 Misc 2d 158).

Appendix C—Opinion of Appellate Division, Second Department, Supreme Court of New York, 24 A.D. 2d 900

The denial of defendant's motion to vacate and set aside the original order authorizing the wiretap did not reach the question of the validity of said order. The motion was denied on a finding that the moving papers in support of the motion to vacate were insufficient. Since the merits of the order were not reached, the ultimate holding does not bar a relitigation of the matters not specifically passed upon (Eagle Lion Studios v. Loews, 248 F. 2d 438, 444, affd. 358 U.S. 100; Southern Pac. R. Co. v. United States, 168 U.S. 1; St. Joseph Union Depot Co. v. Chicago R.I. & P. Ry. Co. 89 Fed. 648; cert. den. 172 U.S. 649; Schneider v. Schneider, 281 App. Div. 250).

The original wiretap order was a proper subject of judicial review in the same manner and to the limited extent permitted with respect to a warrant for search and seizure

We hold that the affidavits in support of the People's motion for an order authorizing a wiretap were suffiicent.

The finding that defendant did not consent to a search of his office is supported by the evidence. Since there was no warrant and the search was not conducted incidental to a lawful arrest, the evidence seized was properly suppressed.

BELDOCK, *P.J.*, CHRIST, HILL, RABIN and BENJAMIN, *JJ.*, concur.

APPENDIX D

Opinion of Justice Rinaldi, Supreme Court of New York, Kings County, 42 Misc. 2d 403

People, & C. v. Carl I. Cohen—The defendant is a physician who is charged with abortion under indictments returned in November, 1960. He now moves under Code of Criminal Procedure, sections 813-c, et seq., to suppress evidence obtained by telephone wiretapping and by a search of his private office. The defendant's private office telephone was tapped by police officers from July 29 to September 2, 1960, pursuant to an ex parte order issued on July 28, 1960. It is conceded by the People that the information obtained from such wiretaps resulted in the leads which culminated in the defendant's arrest for abortion at his home on the night of September 2-3, 1960. At that time, a search was also made at his home and office. The arrest and search was made without a warrant.

This court conducted an extensive evidentiary hearing on the motion to suppress. There was made available to the court, in camera, the affidavits which were presented in support of the application for the ex parte wiretap order, as well as other information.

There can be no serious dispute that pertinent New York statutes contemplate and authorize a review of wiretap orders. Code of Criminal Procedure, section 813-a, authorizing ex parte wiretap orders, itself contemplates, by its incorporation of the constitutional standard "reasonable ground" (which is equivalent to "probable cause"), and by requiring preservation of the papers, that the matter shall be subject to judicial review when necessary. Code of Criminal Procedure secs. 813-c et seq., re motions

to suppress evidence, must be read in the light of the virtually identical Federal motion procedure after which it is obviously patterned. That Federal procedure, it is settled, includes motions to suppress wiretap evidence. New York's new motion procedure (secs. 813-c et seq.) was adopted with the expressly declared legislative purpose of bringing this state into compliance with Federal constitutional search-and-seizure requirements under the Mapp case (367 U. S. 643).

CPLR, section 4506 (formerly C. P. A. sec. 345[a]), also adopted in an express effort by the legislature to meet Federal standards, make inadmissible in criminal prosecutions evidence and evidentiary leads obtained by illegal wiretapping. Therefore, when, as here, a defendant in a criminal prosecution invokes the new motion to suppress procedure in aid of his rights under the new CPLR section 4506, it is impossible to see how the court can avoid the duty of determining whether a claimedly legal telephone wiretap, assertedly authorized under this State's permissive ex parte wiretap legislation above cited, was in fact legally authorized or not under the statutory standards of said permissive procedure. The court is aware of the contention of the People that a prior proceeding which was commenced before Mr. Justice Arkwright who denied the motion to vacate the wiretap order is now a bar to the instant motion (People v. Cohen, 41 Misc. 2d 158). The court finds that such proceeding does not affect its right to pass upon the validity of the wiretap order. Such prior proceeding did not avail itself of the processes of the Code of Criminal Procedure, section 813-c et seq. and in any event

never reached the merits of the issue as to the validity of such order. Mr. Justice Arkwright in his opinion denying the application before him clearly stated, and this court is in complete agreement, that our courts have the inherent power to reconsider the issuance of a wiretap order if perjury or error be shown in the original supporting affidavits or for any other cogent reason. Since the defendant at that time could only furnish limited information to him, his denial was solely on procedural grounds. The appeal from his order was dismissed by the Appellate Division, Second Department (N. Y. L. J., April 18, 1963, p. 16), and leave to appeal to the Court of Appeals was denied on July 10, 1963, by Fuld, J., and the court en banc (13 N. Y. 2d 595).

That being the case, this court deems itself under a duty to consider the issues raised by this motion on the merits. In order to do so, it must determine whether the "reasonable ground" requirement of the Code of Criminal Procedure, section 813-a, was satisfied in the issuance of the wiretap order.

The order was issued on July 28, 1960, by a former justice of this court on the supporting affidavits of Kenneth J. McCabe, chief assistant of the district attorney, now deceased, Alvin G. Rosen and his "girl friend" Audrey Salzman. These two persons were the subject of an investigation by the district attorney in crimes involving forgery, burglary and arson, none of which concerned the defendant in this case, in which it was claimed they had participated. During the course of such investigation, Rosen, in an obvious attempt to curry favor with the police, volunteered

information that the defendant was conducting an "Abortion Mill." The information which he furnished to the police and which was incorporated into the supporting affidavits was as follows: That Rosen and his "girl friend" had at one time visited the defendant to arrange for her abortion; that they could not agree on price; that they left and did not return because she later discovered that she was not pregnant; that a friend of the "girl friend" had once been aborted by the doctor in July or August of 1958 and subsequently again a year later and also in October or November of 1959. Rosen stated and it was so set forth in the supporting affidavits that he had obtained this information from his "girl friend" who in turn had learned of this from her friend. No supporting affidavit was obtained from the "prolific" friend. Thus supporting affidavits based to a great extent on hearsay twice removed and on events which had transpired a long time prior thereto, became the basis for the issuance of the wiretap order. There is also a serious question as to whether or not the police had previous sufficient other dealings with the informer which would have led them to depend upon the reliability of their information. In any event, the police testified that they proceeded to "tap" the office telephone of the defendant and as leads were obtained, they questioned certain females who were observed leaving his office and obtained statements from them which led to the eventual arrest and indictment of this defendant.

In the light of the foregoing, was there "reasonable ground" to believe that "evidence of crime may thus be

obtained'' in order to comply with the statutory requirement under section 813-a?

It is elementary that there can exist no ''probable cause'' to search for mere ''future'' crimes and case law as to ''probable cause'' is concerned with ''past'' or ''present'' crimes (Brinegar v. United States, 338 U. S. 160). At the most therefore, wiretapping may only be permitted upon a showing which meets the tests of ''probable cause'' that a crime has been or is being committed. Under our law as it is presently constituted, law enforcement officers are on the horns of a dilemma. Wiretapping is a crime under federal statutes but is permissible in our state if made with the sanction of a court order. And yet, if such sanction is obtained and ''taps'' made, the question presents itself whether those officers connected with such wiretapping may not be prosecuted for the violation of a federal statute. Wiretap orders are therefore issued with great reluctance and it has become the common practice to avoid issuance if other means are available to law enforcement agencies to obtain the required results.

The reliability of the informers in order for the issuing court to determine for itself ''reasonable grounds'' or ''probable cause'' becomes of paramount importance. If the police vouch for such reliability facts must be stated and brought to the attention of the court to satisfy it that such is the case. The informers, Alvin Rosen and Audrey Salzman at the time they gave information to the police concerning this defendant were themselves deeply enmeshed in what was apparently a major ring of burglars, arsonists and forgers. It is true that they ''accurately'' confessed

their own misdeeds and those of their accomplices in which they had already been implicated. They, at no time, however, previously informed the police as to crimes in which they themselves were not implicated. On that basis, the police had no criteria to judge their reliability concerning information as to this defendant. Vouching as to their reliability had no basis in fact, "• • • the affiant must • • • demonstrate that the informant has established a reputation for reliability so as to be worthy of belief" (United States v. Ramirez, 279 F. 2d 712, 715, C. A. 2, 1960).

Judge Sobel of this court, in his recent Law Journal articles (October 29, 1963) referred to "the rather strict standards of reliability of informers" citing the leading cases of Draper v. United States (358 U. S. 307), Jones v. United States (362 U. S. 257), Henry v. United States (361 U. S. 98). One of our leading cases, People v. Coffey (12 N. Y. 2d 443), along the same lines specifies that "simple, untested rumor is not ground enough nor • • • is untested information from a person of no established reliabilty, or suspicion alone. Substantiation of information can come either from the informer's own character and reputation or from the separate objective checking of the tale he tells." Although these decisions and a multitude of others in the same vein, involved search and seizure, the same standards, at the least, must be applied to wiretap orders. Both types of order are obtained ex parte. However, execution of the search warrant necessarily reveals its issuance and objectives. The same may not be said of wiretap orders which are carried out surreptitiously except in those rare in-

stances where the object of the wiretap learns of it through accident. It would not be amiss for the court to state that, if at all, the standards to test the advisability of issuing a wiretap order should be much more stringent than those applied to search warrants.

The court cannot find anything in the original wiretap affidavits which meet the foregoing tests as to statutory requirements of "reasonable grounds" and "reputation for reliability." It must therefore conclude that the wiretap order was issued contrary to statutory and settled law and the said order is hereby vacated.

The wiretapping activity from July 29 to September 2, 1962, being thus determined to have been illegal in toto, all evidence and all evidentiary leads obtained or derived from the wiretap, and all evidence obtained or derived from such leads, are hereby ordered suppressed and inadmissible pursuant to CPLR, section 4506. In order that there be no doubt as to this, the court finds, from the testimony at the hearing herein, and from the reasonable inferences based on the aforesaid, that the People obtained from the wiretaps, in the case of each of the females, whose alleged abortions are the subject of the indictments, the original information or leads upon which subsequent charges of abortion, or upon which subsequent investigation in turn leading to charges of abortion, were based.

The court finds further, and in conjunction with the findings above stated, that the People's claim that the original information or leads referred to in said above findings were obtained from surveillance or other police activity not inclusive of wiretapping, is not supported by any evidence

other than purely conclusory assertions of the police witnesses. The latter witnesses not having testified concerning any details or concrete circumstances whatever to support such conclusory claims of surveillance results, &c., and the evidence that the original information or leads came from wiretapping being strong and convincing, this conclusory contention of the People is hereby found not to have been established.

The court further finds that the list of names of females which Policewoman O'Meara brought with her to the defendant's office on the night of September 2-3, 1960, for the purpose of checking said list against defendant's private office records, consisted either of names obtained exclusively in the first instance from the wiretaps, or of names obtained by means so inextricably connected with the wiretaps as to be required to be deemed a product thereof as a matter of law and for the purposes of the instant proceeding. The only inference permitted by the testimony and by the other records of this proceeding is that the aforesaid list of names was in itself in fact either a sole product of the wiretap, or a joint product of the wiretap plus the defendant's office records (especially the lost diary or desk calendar as to which see further infra); or was the sole produce of said office records, and that said list to the extent that it was the product of said office records was made up during or after the search of the night of September 2-3, 1960, rather than being in existence prior thereto as claimed by the People.

The People admit, and the court finds that during the search of September 2-3, 1960, the People seized a diary

or desk calendar from the defendant's private office, and that said diary or calendar subsequently disappeared while in the custody of the People.

The People also admit, and the court finds that during the search of the night of September 2-3, 1960, the People made a detailed examination of the file of patients' index cards in the defendant's private office, and that the police took written notes thereof. In this connection the court further finds that the People have not produced such written notes in their entirety at the within hearing.

The People have not produced in this hearing any written notes or memoranda as to the contents of the lost diary or desk calendar. In the overall circumstances of this case, the conclusory assertions of the police witnesses that no information relevant to the issues of this proceeding was obtained by the People from the lost diary or desk calendar, cannot be taken probatively into account in the findings herein.

From the aforesaid findings it is concluded that the People obtain [sic] either from the wiretaps or from the search of September 2-3, 1960, or from both of these in combination, their original information or leads upon which subsequent charges of abortion, or upon which subsequent investigation in turn leading to charges of abortion, were based in the case of each of said females.

In as much as the arrest of the doctor was unlawful in that it was the fruit of wiretap activity now found by the court to have been illegal, the subsequent search of defendant's office immediately following his "arrest" was likewise unlawful. The People claim that the search was justified

because the defendant invited them to do so and consented thereto. There is a presumption against consent or waiver of a defendant's constitutional right to be free from unreasonable search and seizure and the People have the burden of affirmatively establishing free and voluntary consent (Johnson v. Zerbst, 304 U.S. 458; Pekar v. United States, 315 F. 2d 319; United States v. Smith, 308 2d 657, 663). The court finds that the People have failed to overcome this presumption and that the testimony concerning this phase of the proceedings, if anything, negates any such consent or waiver.

In view of the findings of the court, there is no need to make comment or evaluate the other points set forth in the briefs submitted by counsel for the defendant.

The motion is granted in all respects. Settle order.

APPENDIX E

Federal Constitutional Points Urged by Petitioner Before Justice Rinaldi, Supreme Court of New York, Kings County, Quoted from "Summary of Defendant's Points" in the Typewritten Memorandum of Law Before the Latter Court

(1) The wiretap order of July 28, 1960, was (a) unlawful and (b) unconstitutional. It was unlawful because issued in violation of the statutory requirement of "reasonable ground to believe that evidence of crime may be thus obtained" (Code Crim. Proc. §813-a); we shall show that this statutory standard of "reasonable ground' is (and since the decision of the *Mapp* case must be) construed as meaning the same as "probable cause" under the Fourth Amendment of the Federal Constitution. The statutory violation herein consisted, *first*, in the lack of a *reliably* founded showing of "reasonabe ground", i.e., the insufficiency of the supporting affidavits in that they were based on information allegedly given by Alvin Rosen and Audrey Salzman, informants of no proven reliability in regard to abortion charges against defendant Cohen or indeed against anyone. The statutory violation consisted, *second*, in the failure to show that a crime had actually been committed or was being then presently committed, as to which the wiretap would produce "evidence"; i.e., unless the affidavits showed that wiretap information would "evidence" a crime already allegedly committed or then being committed, then the wiretap must have been sought in order to obtain evidence of future crime, and this the statute does not authorize (nor does the Constitution). Further, even if the statute *arguendo* may be read as authorizing a wire-

tap upon "reasonable ground" to believe that evidence of future crime may be obtained, no such showing was made.

In any event, the statute is unconstitutional if read to authorize a wiretap for the obtaining of mere evidence as distinct from fruits or instrumentalities of a crime—a point which we develop rather fully later in this brief. Finally, the statute in allowing *any wiretapping at all* is unconstitutional in its entirety under the Supremacy Clause of the Federal Constitution (Art. VI) because, by establishing a permissive procedure for wiretapping, it contravenes §605 of the Federal Communications Act (Title 47 U.S.C.) as well as the Fourth Amendment (unreasonable searches) and the Fifth Amendment (self-incrimination) in combination with the Fourteenth Amendment (due process of law) of the Federal Constitution.

(2) The wiretap order being illegal and unconstitutional, all evidence obtained *via* the wiretap, whether consisting of leads or otherwise, is inadmissible under the amended §345(a) of the Civil Practice Act, now §4506 C.P.L.R., and should be ordered suppressed in the instant proceeding. It is important to note that the latter statute bars not only "evidence obtained through" an illegal wiretap but also "evidence * * * resulting from information obtained by any such act". In other words, evidence resulting from illegal wiretap-obtained *leads* is expressly barred by this statute.

(3) The amended §345(a) just mentioned is part of a nothing-less-than historic overhauling of the entire body of legislation in this State relating to both search-and-seizure in general and wiretapping in particular. This overhauling,

as we shall show in detail in this brief, has been done in obedience to the command of *Mapp* v. *Ohio*, 367 U.S. 643. The overhauling has included the adoption, for the first time in this State, of a comprehensive motion procedure for suppression of evidence obtained by illegal search (*Code Crim. Proc.* §§813-c to 813-e). This new motion procedure (invoked by us herein) is of special interest in one particular respect affecting the instant proceeding, i.e., the new motion procedure parallels the long-familiar Federal motion to suppress (Fed. Rules Crim. Proc. 41(e)) in which it is of the very essence of the procedure that the motion preferably be made at the earliest possible state before trial (see the explicit language to this effect in first sentence of *Code Crim. Proc.* §813-d). If, as we contend, these statutory changes in New York State (and the Federal Constitutional requirements which evoked them) have now imported into New York law the Federal standards of legal and reasonable search, then the new motion procedure (§§813-c et seq., *supra*) must include motions to suppress illegal wiretap evidence under the authoritative precedent of the parallel Federal motion procedure (F. R. Cr. P. 41 (e)) which applies to such wiretap situations (e.g., *United States* v. *Carney*, 188 F. Supp. 86 (E.D.N.Y. 1960)). Nor is this conclusion weakened by the fact that the New York §813-c refers only to "property, papers or things", because the Federal Rule 41(e) is even more restrictively worded (it mentions only "property") and yet it is applied by the Federal Courts in motion proceedings for the suppression of wiretap evidence and leads and not only for suppression of physical evidence seized in a search. Interestingly also,

both the New York (§813-c) and the Federal (Rule 41(e)) provisions contain a virtually identical sentence whose effect is to open up unlimitedly the power of the Court in such motion proceedings to decide the suppression issues in their most comprehensive scope ("The (Judge) (Court) shall (hear) (receive) evidence on any issue of fact necessary to the (decision) (determination) of the motion.").

(4) The illegal and unconstitutional wiretap was the indispensable source of the original alleged leads to all of the alleged female abortion complainants under the within five indictments. This topic takes up a major part of our detailed factual recitals later in this brief. Those leads and all evidence emanating therefrom should be suppressed. The conclusion just suggested that the leads came from the wiretap is indicated by even the limited testimony which the court allowed in this hearing concerning the wiretap operation. However, in view of the People's claim that these indicated wiretap leads were obtained in other ways, ways which were never satisfactorily (to put it mildly) explained by the People, and in view of the fact that this case involves both a wiretap and a subsequent search (both of which operations we contend were illegal), the question naturally arises as to whether or to what extent all or some of the leads came from that search which took place in defendant's office on September 3, 1960*. Unfortunately, the exploration of this extremely interesting question was severely handicapped by the unavailability of

---

* This search and its illegality are more specifically noted in later paragraphs of this summary, and in our full argument treatment below.

the primary document which could have yielded the definitive answers to this question. This document, the defendant's office desk diary or calendar, was seized by the police in the search of September 3, 1960, but at the hearing herein they claimed they had "lost" or "misplaced" it. Thus, the People first tried to block altogether any disclosure of whether the leads came from the wiretap, they then tried to obscure such disclosure further by raising a cloud of vague hints and ambiguous assertions as to claimedly legal sources of such leads, and finally by "losing" or "misplacing" the all important desk diary they effectively blocked disclosure of whether the leads came from the illegal search and ultimate seizure of the desk diary rather than from the illegal wiretap. We argue in Point IV of this brief that this overall conduct of the People is in itself a sufficient ground requiring the granting of our motion to dismiss.

(5) Specifically, the illegal and unconstitutional wiretap was the indispensable source of the alleged lead to the alleged abortion complainant Esther Richards. The situation involving Esther Richards on September 2 and 3, 1960 was the sole ostensible basis for the arrest of the defendant on September 3 and for the search made assertedly incident to that arrest. Neither the search nor the arrest were made upon a warrant; they were based solely on the police officers' asserted probable cause to believe that the crime of abortion on Esther Richards had been committed; and this asserted probable cause, as just mentioned, was based on alleged happenings which were the product of illegal and unconstitutional wiretap leads.

Appendix E—Federal Constitutional Points Urged by Petitioner Before Justice Rinaldi, etc.

(6) We contend also that the defendant did not consent to the search of September 3, 1960, and that the People have not sustained their burden of proving any such consent or waiver.

(7) A further constitutional infirmity in the search is that it was unreasonable in scope and too remote in time from the arrest, insofar as it included a search of defendant's office in Brooklyn, the arrest having been made earlier at the defendant's home in Neponsit, Queens.

(8) The search was constitutionally obnoxious for the further reasons that it was unreasonable as a warrantless search made in the nightime, and that the overall conduct of the officers and the District Attorney preceding and during the arrest and search was unreasonable in the total atmosphere of the case; these overall features of the situation are additionally noted in later paragraphs of this summary. All evidence obtained in the search of September 3, 1960, and all evidentiary leads therefrom and the products of such leads, should be suppressed.

(9) An additional point which we urge with regard to the Esther Richards' situation is that the evidence allegedly obtained from her by the police on September 2, 1960—when she was forcibly intercepted and detained while riding in the private automobile of a friend, subjected to lengthy interrogation, forced to go to Kings County Hospital and there to undergo a gynecological examination, and thereafter forced to go to the District Attorney's office where she was subjected to further prolonged interrogation—should be suppressed because, in the overall circum-

stances thus presented, this was not "legal" evidence within the meaning of Code Crim. Proc. §249. We respectfully contend that, by virtue of the last-mentioned special statutory restriction in this State and under the tests laid down by the Supreme Court of the United States for evaluating the overall reasonableness of a search-and-seizure situation in terms of the "total atmosphere of the case" (see citations *infra*) and the overall conduct of the police officers, this extraordinary police conduct in extracting the alleged Esther Richards evidence is a matter which the defendant has legal standing to raise even though it was not he himself who was the direct and immediate physical victim of this police action.

(10) Further as to the search of September 3, 1960 and its relation to the wiretap:—Policewoman O'Meara inspected, during the search of defendant's office, his patients' index cards and his desk calendar or diary; the latter item she seized and took with her. Her inspection of these items was made with a view to checking a list which she had brought with her to defendant's office for this purpose. This list, which included names of female patients of the defendant, dates of their visits to the defendant, and other information, was at least in very large part the product of the illegal and unconstitutional wiretap. Thus, by utilizing the illegal wiretap-obtained list in conjunction with the illegally search-obtained index cards and diary, the police compounded the illegality of both the wiretap-obtained evidence and the search-obtained evidence.

(11) The overall circumstances of due process unfairness, as well as Fourth Amendment unconstitutionality,

which arise from the situation mentioned in the preceding paragraphs are aggravated by conduct of the police (or of the District Attorney's office, or of both) which, if it does not actually point to deliberate spoliation of evidence, at least points to the dire constitutional necessity of protecting the defendant against the consequences of a remarkable series of destructions, losses, misplacings and otherwise-occurring unavailability of records that are vital to the just determination of the within motion for suppression of evidence. The single most striking instance of this is the alleged loss or misplacing of defendant's desk calendar or diary, which was admittedly utilized by the police to develop leads for the indictment charges in conjunction with the wiretap-obtained leads.

(12) The overall due process unfairness of the tactics of the police and the District Attorney's office is aggravated also by their improper attempts to play cat-and-mouse with the defendant and with this Court in regard to various important facts of the admitted wiretap operations. The District Attorney insisted that disclosure of the contents of the wiretap—and even of individual police officers' participation in the wiretapping—should not be required in this proceeding because it would be a violation of Federal law, yet he blandly represented his readiness to make such disclosures at the trial of the indictments. Such a cynical announcement by a public prosecutor that he will himself choose the forum in which to violate the Federal law against wiretapping not only vitates any ostensible legal or good-faith justification for the Prosecutor's refusal to make the disclosure in this proceeding, but it also amounts to a

method of prosecution so outrageously unfair as to constitute a violation of due process of law.

(13) Finally, we shall develop at appropriate places throughout this brief the distressingly numerous instances in which the veracity of the police witnesses was indicatedly questionable. This unhappy theme needs to be developed because of its bearing on the previously mentioned tests which the United States Supreme Court has promulgated for the evaluation of the Fourth Amendment reasonableness of searches in terms of the "total atmosphere of the case" and the overall conduct of the police officers.

APPENDIX F

Federal Constitutional Points Urged by Petitioner Before the Appellate Division, Second Department, Supreme Court of New York, Quoted from Index to "Respondent's Brief" in the Latter Court

POINT I—The proceedings in the Court below were not barred, on any principle of *res judicata* or collateral estoppel, by reason of anything derivable from the proceedings before Mr. Justice Arkwright.

POINT II—The Court below had jurisdiction, power and authority to entertain and to decide the motion in its entirety, including the part of the motion addressed to the validity of the ex parte wiretap order.

POINT III—The Court below correctly ruled that the ex parte wiretap order was invalid under Code Crim. Proc. §813-a because based upon an inadequate showing of "reasonable grounds" and that the wiretap evidence and leads should be suppressed pursuant to C.P.L.R. §4506.

POINT IV—A. The following rulings of the Court-below are not directly assailed by the People in this appeal but are merely viewed by the People as "irrelvant":—(1) That the evidence on which the indictments were based was derived from wiretapping or from the search of September 2-3, 1960, or from both sources; (2) that the arrest and search of September 2-3, 1960 were unconstitutional both by reason of their being integrally connected with and derived from the antecedent illegal wiretap, and by reason of the utter lack of "probable cause" aside from the wiretap-obtained leads; and (3) that the search was not validated by any consent or waiver.

Appendix F—Federal Constitutional Points Urged by Petitioner Before the Appellate Division, etc.

B. In view of the People's eschewal of argument on these issues, they should be deemed non-litigated by the People for the purposes of this appeal.

POINT V—In regard to both the wiretapping and the search, i.e., viewing the overall conduct of the police in this case in constitutional terms, the order appealed from is proper because the conduct of the police officers fell far below the standards established by the Supreme Court of the United States under the test of "the overall atmosphere of the case":

The Applicable Fourth Amendment Standards: The Tests Laid Down By The Supreme Court Of The United States As To "The Total Atmosphere Of The Case" And "Particularized Evaluation Of The Conduct Of The Officers" Both Prior To And During The Arrest Or Search.

Spoliation of Evidence and Improper Keeping of Records.

The Unreasonable Extension Of The Scope Of The Search To Include Defendant's Office Premises In Brooklyn.

The Extraordinary Conduct of the Police in Extracting Alleged Admissions From The Complainant Esther Richards.

APPENDIX G

Points Urged by the Prosecution in the Appellate Division, Second Department, Supreme Court of New York, Quoted from Index to "Appellant's Brief" in the Latter Court

POINT I—The court below should have refused to entertain the motion under the principle of res judicata. The denial of the prior motion by Arkwright, J. (order of February 26, 1963) determined the law of the matter and precluded an application to any other justice of the same court for the same relief.

POINT II—The court below lacked power to entertain the motion to determine whether or not there had been illegal and unlawful use of wiretaps and for the suppression of evidence thereby procured.

POINT III—The original wiretap order of July 28, 1960 was validly issued upon proper affidavits.

POINT IV—The findings of fact made by the court below are irrelevant to the issue of this appeal.

POINT V—The order appealed from should be reversed.

APPENDIX H

Federal Constitutional Points Urged by Petitioner Before the New York Court of Appeals, Quoted from Index to "Appellant's Brief" in the Latter Court

POINT I—The proceedings before Mr. Justice Rinaldi were not barred, on any principle of *res judicata* or collateral estoppel, by reason of anything derivable from the proceedings before Mr. Justice Arkwright.

POINT II—Mr. Justice Rinaldi had jurisdiction and power to entertain and to decide the motion in its entirety, including the part of the motion addressed to the validity of the wiretap order.

POINT III—A. The unelaborated conclusion of the Appellate Division that the wiretap affidavits were sufficient is error.

B. Mr. Justice Rinaldi correctly ruled that the wiretap affidavits were insufficient under the "reasonable grounds" requirement of Code Crim. Proc. §813-a.

C. If the wiretap affidavits be deemed in compliance with §813-a, there must then be reached the question of the constitutionality of that statute as applied to this case, and we urge that the statute as so applied is unconstitutional under the Federal Fourth Amendment because it authorizes a search for evidence of crime and not solely for property or for fruits or instrumentalities of crime.

POINT IV—People v. Dinan, 11 N.Y. 2d 350 should be overruled, and all evidence obtained or derived directly or indirectly from wiretapping in this case should be ex-

Appendix H—Federal Constitutional Points Urged by Petitioner Before the New York Court of Appeals, Quoted from Index to "Appellant's Brief" in the Latter Court

cluded as violative of Federal Constitutional and Statutory Prohibitions, if the Court should find it necessary to reach these constitutional questions, i.e., if the wiretap evidence herein is not excluded on the ground of the insufficiency of the affidavit or on other anterior grounds.

POINT V—The judgment appealed from should be reversed because it was evidently rendered without regard to the issues, which were deemed independently decisive by Mr. Justice Rinaldi, as to the inextricably interwoven character of the wiretap with the indisputably unconstitutional search of September 2-3, 1960; and because in several other aspects relating to both the wiretapping and the search, i.e., viewing the overall conduct of the police in this case in constitutional terms, the conduct of the police officers fell far below the standards established by the Supreme Court of the United States under the test of "the overall atmosphere of the case".

Introductory: The Problem Of The Relationship Between the Search And The Wiretap.

The Applicable Fourth Amendment Standards: The Tests Laid Down By The Supreme Court Of The United States As To "The Total Atmosphere Of The Case" And "Particularized Evaluation Of The Conduct Of The Officers" Both Prior To And During The Arrest Or Search.

Spoliation of Evidence and Improper Keeping of Records.

Appendix H—Federal Constitutional Points Urged by Petitioner Before the New York Court of Appeals, Quoted from Index to "Appellant's Brief" in the Latter Court

The Unreasonable Extension Of The Scope Of The Search To Include Defendant's Office Premises In Brooklyn.

The Extraordinary Conduct of the Police In Extracting Alleged Admissions From The Complainant Esther Richards.

Conclusion To Point V: Further Remarks As To The Relationship Between The Wiretap And The Search, And As To The Possible Need For A Remand For Further Proceedings.

APPENDIX I

Points Urged by the Prosecution Before the New York Court of Appeals, Quoted from Index to "Respondent's Brief" in the Latter Court

POINT I—Code Crim. Pro. Section 813-a offends no Federal or New York State constitutional provision.

POINT II—The original wiretap order of July 28, 1960 was legally issued upon proper affidavits.

POINT III—The Appellate Division erred in holding that the denial by Arkwright, J. of the first motion to vacate and set aside the wiretap order of July 28, 1960 did not reach the question of the validity of that order and therefore did not bar a relitigation of an identical motion before Rinaldi, J. The Arkwright denial determined the law of the matter and precluded an application to any other Justice of the same court for the same relief.

POINT IV—No remand for further hearings is necessary.

The court should enunciate a rule prohibiting pre-trial motions to inspect wiretap affidavits and orders.

POINT V—The order appealed from should be modified so as to restrain and preclude the People from using upon the trial of the appellant only articles of evidence seized or examined by police officers of the City of New York in the defendant's home on September 2nd and 3rd, 1960, and any and all leads and clues revealed or any information directly or indirectly obtained as a result of the use of articles of evidence so seized or examined; and as so modified, the order of the Appellate Division should be affirmed.

APPENDIX J

Statutes Involved

1. 47 U.S.C. §605

§ 605. Unauthorized publication or use of communications

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such

information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided,* That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress. June 19, 1934, c. 652, Title VI, § 605, 48 Stat. 1103.

2. N.Y. Code Crim. Proc. §518-a

§ 518-a. Appeal from order granting motion for return of property or suppression of evidence, confession or admission; how taken

In taking an appeal from an order granting a motion for the return of property or suppression of evidence or for the suppression of a confession or admission pursuant to subdivision six of section five hundred eighteen, the people must file, in addition to a notice of appeal as required by section five hundred twenty-two, a statement asserting that the deprivation of the use as evidence of the property ordered to be returned or suppressed, or of the confession or admission ordered to be suppressed, has rendered the sum of the proof available to the people with respect to a criminal charge which has been filed in a court, or which the people propose to file or to cause to be filed in a court, either (1) insufficient as a matter of law, or (2) so weak in its entirety that any reasonable possibility of prosecuting such charge or prospective charge to a conviction has been effectively destroyed.

The taking of such an appeal and the filing of such a statement shall constitute a bar to (1) the filing of any criminal charge against the moving party involving the property in question, and (2) the prosecution of any existing criminal charge against the moving party involving the property, confession or admission in question, unless and until the order of return or suppression is reversed on appeal and vacated. Added L. 1962, c. 954, § 3; amended L. 1965, c. 846, § 3, eff. July 16, 1965.

3. N.Y. Code Crim. Proc. §813-a

§813-a. Ex parte order for eavesdropping

An ex parte order for eavesdropping as defined in subdivisions one and two of section seven hundred thirty-eight of the penal law may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overhead or recorded and the purpose thereof, and, in the case of a telegraphic or telephonic communication, identifying the particular telephone number or telegraph line involved. In connection with the issuance of such an order the justice or judge may examine on oath the applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable grounds for

Appendix SB, Notice of Motion, Affidavit and Brief for Re-Argument in New York Court of Appeals

Appendix 8B, Notice of Motion, Affidavit and Brief for Re-Argument in New York Court of Appeals

Court of Appeals

STATE OF NEW YORK

Appeal No. 223 (Decided July 7, 1966)

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—against—

CARL I. COHEN,

Appellant.

NOTICE OF MOTION, AFFIDAVIT AND BRIEF FOR RE-ARGUMENT

KLEINMAN, GOLD & LANDSMAN
Attorneys for Appellant-Movant
Carl I. Cohen
66 Court Street
Brooklyn 1, New York

Of Counsel:
EUGENE GOLD

32 CASE PRESS INC., 421 HUDSON ST., N.Y.—ORegon 5-4540

INDEX

	PAGE
Notice of Motion for Re-argument	1
Affidavit in Support of Motion for Re-argument ..	3
Brief in Support of Motion for Reargument	9
Conclusion	16

Court of Appeals

State of New York

Appeal No. 223 (Decided July 7, 1966)

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—against—

CARL I. COHEN,

Appellant.

Notice of Motion for Re-argument

SIRS:

PLEASE TAKE NOTICE that, upon the annexed affidavit of Eugene Gold, Esq., sworn to September 19, 1967, upon all the proceedings heretofore had herein, including proceedings in the Supreme Court of the United States, and upon the brief annexed hereto, the undersigned will move before the Court of Appeals of the State of New York, at its Courthouse in Albany, New York, on September 25, 1967, at 10:00 a.m., or as soon thereafter as counsel can be heard, for reargument of the appeal above captioned, which was decided by the Court of Appeals as Appeal No. 223 on July 7, 1966, 18 N.Y. 2d 650.

Yours, etc.

KLEINMAN, GOLD & LANDSMAN
Attorneys for Appellant-Movant
Carl I. Cohen
66 Court Street
Brooklyn 1, New York

EUGENE GOLD
Of Counsel

Notice of Motion for Re-argument

To:

Hon. Aaron E. Koota
District Attorney, Kings County

Hon. Raymond J. Cannon, Clerk
Court of Appeals of the State of New York
Albany, New York

Affidavit in Support of Motion for Re-argument

COURT OF APPEALS

STATE OF NEW YORK

Appeal No. 223 (Decided July 7, 1966)

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—against—

CARL I. COHEN,

Appellant.

STATE OF NEW YORK }
COUNTY OF KINGS } ss.:

EUGENE GOLD, being duly sworn, deposes and says:

I am one of the attorneys for the appellant-movant herein, Carl I. Cohen. I make this affidavit in support of the within motion for re-argument.

There has been one previous motion for re-argument on behalf of the appellant Cohen in this appeal (denied February 16, 1967, Motion No. 111, 19 N.Y. 2d 673); that prior motion for re-argument occurred in a setting of fact and law not related to the grounds for the present (second) motion for re-argument.

The within appeal was decided by this Court on July 7, 1966, 18 N.Y. 2d 650. Certiorari and re-hearing were denied by the Supreme Court of the United States on December 5, 1966, and January 16, 1967, respectively (— U.S. —, 17 L. Ed. 2d 438; — U.S. —, 17 L. Ed. 2d 680) (Oct. Term 1966, no. 614). The denial of certiorari was "for want of a final judgment".

Affidavit in Support of Motion for Re-argument

For reasons developed *infra* in this affidavit, and in the brief filed herewith, there are two circumstances in connection with the latter denial of Federal certiorari (and of Federal re-hearing) which are believed to have a significant bearing on our present motion for re-argument in this Court, namely, (1) the fact just mentioned that the denial of certiorari was "for want of a final judgment", and (2) the fact that said denial of certiorari (and of re-hearing) antedated by some six months the decision of the United States Supreme Court in *Berger v. New York*, — U.S. —, 18 L. Ed. 2d 1040, decided June 12, 1967.

The appeal which was before this Court in the present case, and in which we are now seeking re-argument, arose as follows:—The appellant-movant Carl I. Cohen (a physician) was indicted for abortion in Kings County. In a pre-trial proceeding in the abortion prosecution the District Attorney acknowledged on the record (R. 71, 85-87)* that Dr. Cohen's office telephone had been wiretapped pursuant to *ex parte* Court order, prior to his arrest and indictment. There had also been a search of Dr. Cohen's home and office at the time of his arrest (pre-indictment).

Proceedings were instituted on Dr. Cohen's behalf for suppression of evidence obtained by the wiretap and the search. This latter motion to suppress was heard by Mr. Justice Rinaldi, Supreme Court, Kings County. Mr. Justice Rinaldi invalidated both the wiretap and the search (42 Misc. 2d 403). On appeal by the People to the Appellate Division, Second Department, Mr. Justice Rinaldi's invalidation of the search was affirmed, but his decree was modified so as, in effect, to reinstate the wiretap evidence as having been legally obtained (24 A.D. 2d 900). Dr. Cohen appealed (by leave) to this Court from the modification order of the Appellate Division. This Court affirmed the

* This refers to the printed Record on Appeal in this Court in the within appeal.

order of the Appellate Division, Chief Judge (then Judge) Fuld dissenting in a memorandum in which then Chief Judge Desmond concurred, the dissent stating in part as follows (18 N.Y. 2d 650):

> "I adhere to the views I expressed in People v. Dinan (11 N.Y. 2d 350, 357)—that evidence should be excluded if obtained by interception of telephone communications in contravention of the Federal Communications Act, and, accordingly, vote to reverse * * *".

As above recited the Supreme Court of the United States denied certiorari to review this Court's latter decision, the denial being "for want of a final judgment" (— U.S. —, 17 L. Ed. 2d 438).

In our printed brief in the within appeal before this Court we expressly raised the question of the Federal Fourth Amendment constitutionality of Code Crim. Proc. §813-a, the permissive wiretap legislation, and we also expressly urged that *People* v. *Dinan*, 11 N.Y. 2d 350 should be overruled and that all evidence obtained or derived directly or indirectly from wiretapping in this case should be excluded on Federal constitutional grounds (see the printed "Appellant's Brief and Appendix" just referred to, at pp. 45, 53-59).

As noted, the Supreme Court of the United States did not decide *Berger* v. *New York, supra*, until some six months after the denial of certiorari in the present case and until nearly a year after this Court's affirmance of the decision of the Appellate Division which upheld the validity of the wiretapping at Dr. Cohen's office.

Since we respectfully believe that one necessary effect of the *Berger* decision in the Supreme Court of the United States was the invalidation of §813-a as to telephone wiretapping (and not only as to electronic room "bugging"),

we submit that an appropriate and indeed compelling situation is presented for reargument of the within appeal pursuant to Rule XX of this Court. In our brief annexed hereto we show in detail the impact of the *Berger* case on the questions of the Federal constitutionality of (1) State telephone wiretapping in general and (2) the New York permissive wiretap legislation in particular.

Since, as above recited, the People have admitted the use of wiretapping in this case, and since (as pointed out in our aforementioned printed brief in this Court, pp. 5-6, 13-25, 60-61, 74-75) this prosecution indisputably cannot be maintained without the wiretap evidence or evidentiary leads because the search-obtained evidence (being the only alternative source) has already been adjudicated as unconstitutional in this case (*supra*), a determination by this Court as to the constitutionality of the wiretap in the light of *Berger* would appear to be an altogether proper and necessary further step in this case *via* the Rule XX reargument procedure.

Further as to the previously mentioned fact that the denial of certiorari in this case last January (preceding *Berger*) was "for want of a final judgment", I would respectfully note that this language of the Supreme Court of the United States negates in the plainest way any intimation that that Court was expressing any judicial evaluation of the Federal constitutional merits of our wiretap contentions in this case when it denied certiorari. It is familiar in any event that a denial of certiorari "imports no expresson of opinion on the merits of the case, as the Bar has been told many times". *United States* v. *Carver*, 260 U.S. 174, 181; and see the extensive discussion in *Stern* and *Gressman, Supreme Court Practice* (3rd Ed.), pp. 179-184.

No previous application has been made for the relief herein sought on the grounds herein advanced; that is, the

present motion for reargument is based upon the supervening effect of the decision of the Supreme Court of the United States in *Berger* v. *New York, supra,* whereas our prior motion for reargument (cited near the outset of this affidavit) was in a wholly different setting and on grounds wholly unrelated hereto.

Wherefore it is respectfully prayed that this motion for reargument should be granted in all respects.

EUGENE GOLD

Sworn to and subscribed to before me
this 19th day of September, 1967

MARK A. LANDSMAN
412248425
Qualified in Queens
Filed in Kings
Commission expires March 30, 1969

Court of Appeals

State of New York

Appeal No. 223 (Decided July 7, 1966)

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—against—

CARL I. COHEN,

Appellant.

BRIEF IN SUPPORT OF MOTION FOR REARGUMENT

This brief is respectfully submitted in support of the within motion for reargument by the appellant-movant, Dr. Carl I. Cohen.

This brief will be confined to an item-by-item presentation of those portions of the decision of the Supreme Court of the United States in *Berger* v. *New York*, — U.S. —, 18 L. Ed. 2d 1040, which are believed by us to support the contention that the *Berger* case has invalidated, for all practical constitutional purposes, State telephone wiretapping in general unless done in compliance with the Fourth Amendment, and this State's permissive wiretapping legislation in particular (Code Crim. Proc. §813-a) as being on its face violative of the Fourth Amendment.

(All of our references *infra* to the *Berger* decision of the United States Supreme Court are to the *pamphlet* issue of 18 L. Ed. 2d, No. 7, dated July 17, 1967.)

Preliminarily, it will be recalled that *Berger*, on its facts, involved electronic room "bugging", rather than telephone wiretapping—although, as we shall note *infra*, there are

significant expressions in the dissenting opinion of Mr. Justice Harlan in *Berger* which evidently equate or assimilate telephone wiretapping and room "bugging" with reference to one factual incident in the *Berger* record that did involve "search" of telephone conversation, namely, the picking-up on the Neyer room "bug" of a telephone conversation between Neyer and Berger.

The following recital of the pertinent items from the several separate opinions in *Berger* is designed, then, to focus attention upon the necessary decisional and doctrinal impact of *Berger* upon the issue of the Federal Fourth Amendment constitutionality of State telephone wiretapping and of the New York permissive legislation here involved.

(1) Early in the opinion of the majority Justices in *Berger*, by Mr. Justice Clark, there is a historical review of telephone wiretapping as constituting a form of "eavesdropping" (18 L. Ed 2d at pp. 1044-1046), it being evident moreover from the majority opinion as a whole (details *infra*) that the Court—indeed also all of the Justices who wrote separate opinions (*infra*)—was treating undifferentiatedly, for Fourth Amendment purposes, telephone wiretapping and electronic room "bugging".

(2) In the portion of Mr. Justice Clark's opinion (for the Majority) numbered "III" (18 L. Ed. 2d at pp. 1046-1047), there is similar undifferentiated reference to the right "of individual privacy" under the Fourth Amendment.

(3) In the portion of Mr. Justice Clark's opinion numbered "IV" (18 L. Ed. 2d at pp. 1047-1049), we find the very significant announcement by the Court that *Olmstead* v. *United States*, 277 U.S. 438, the first telephone wiretap case which reached the Supreme Court, had been "negated [for Fourth Amendment purposes] by our subsequent cases * * *"; that those subsequent cases "found 'conversation' was within the Fourth Amendment's protections, and that

the use of electronic devices to capture it was a 'search' within the meaning of the Amendment, and we so hold." Immediately after this Mr. Justice Clark went on to note the post-*Olmstead* Federal legislation against telephone wiretapping, and the *Nardone* cases which extended the exclusionary rule to wiretap evidence in federal prosecutions (18 L. Ed. 2d p. 1048). In this same portion of the majority opinion the Court also emphasized, with the use of the word "significantly", the language in *Silverman* v. *United States*, 365 U.S. 505, that technical "trespass" is not the essence of the test of constitutionality of "eavesdropping" under the Fourth Amendment, but "It is based upon the reality of an actual intrusion into a constitutionally protected area" (*ibid*). This theme of the significance of intrusion into a constitutionally protected area—a theme obviously applicable to telephone wiretapping equally with room "bugging"—recurs throughout the several *Berger* opinions (*infra*).

(4) In the portion of Mr. Justice Clark's opinion numbered "V" (18 L.Ed. 2d at pp. 1049 *et seq.*), the Court again emphasized the Fourth Amendment protection of "privacy" and noted that this protection had already been applied to the States (*id.*, at p. 1049).

(5) Also in "V" of Mr. Justice Clark's opinion the Court took up a detailed textual analysis of New York's Code Crim. Proc. §813-a (*id.*, at pp. 1049-1053). Throughout this analysis of the statute the Court in *Berger* treated the issues as being Fourth Amendment issues; it plainly treated the statute as permitting "eavesdropping" or "electronic devices" as methods of "search" within the meaning of the Fourth Amendment, it referred again to such "searches" as occurring electronically within "constitutionally protected areas", and it condemned the New York legislation on several Fourth Amendment grounds ("general warrant", improper duration of the search, and failure to require a showing of "exigent circumstances" in justification

of "secrecy" or "unconsented entry")—and throughout this entire portion of the Majority opinion in *Berger* the discussion made no differentiation as between room "bugging" and telephone wiretapping under the New York State permissive legislation.

(6) In the portion of Mr. Justice Clark's opinion numbered "VI" (18 L.Ed. 2d at pp. 1053-1055), where the Court discussed *inter alia* the current debate over the needs of law enforcement *versus* the Fourth Amendment prohibition against electronic searches in constitutionally protected areas, the Court made copious reference to data of telephone wiretapping, it referred also to "the fantastic advances in the field of electronic communication [which] constitute a great danger to the privacy of the individual", and it concluded as follows (*id.*, at pp. 1054-1055):

> "In any event we cannot forgive the requirements of the Fourth Amendment in the name of law enforcement. This is no formality that we require today but a fundamental rule that has long been recognized as basic to the privacy of every home in America. While '[t]he requirements of the Fourth Amendment are not inflexible, or obtusely unyielding to the legitimate needs of law enforcement,' Lopez v. United States, supra, 373 US at 464, 10 L ed 2d at 485, dissenting opinion of Brennan, J., it is not asking too much that officers be required to comply with the basic command of the Fourth Amendment before the innermost secrets of one's home or office are invaded. Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices. Some may claim that without the use of such devices crime detection in certain areas may suffer some delays since eavesdropping is quicker, easier, and more certain. However, techniques and practices may well be developed that will operate just as speedily and certain—and what is more important—without attending illegality.

It is said that neither a warrant nor a statute authorizing eavesdropping can be drawn so as to meet the Fourth Amendment's requirements. If that be true then the 'fruits' of eavesdropping devices are barred under the Amendment. On the other hand this Court has in the past, under specific conditions and circumstances, sustained the use of eavesdropping devices. See Goldman v United States, supra; On Lee v United States, supra; Lopez v United States, supra; and Osborn v United States, supra. In the latter case the eavesdropping device was permitted where the 'commission of a specific offense' was charged, its use was 'under the most precise and discriminating circumstances' and the effective administration of justice in a federal court was at stake. The States are under no greater restrictions. The Fourth Amendment does not make the 'precincts of the home or office . . . sanctuaries where the law can never reach.' Douglas, J., dissenting in Warden, Maryland Penitentiary v Hayden, supra, but it does prescribe a constitutional standard that must be met before official invasion is permissible. Our concern with the statute here is whether its language permits a trespassory invasion of the home, by general warrant, contrary to the command of the Fourth Amendment. As it is written, we believe that it does.

Reversed."

(7) In the concurring opinion of Mr. Justice Douglas (18 L. Ed. 2d at pp. 1055-1057), the opinion of the Court (by Mr. Justice Clark) is hailed, "because at long last it overrules sub silentio *Olmstead* v. *United States* * * * and its offspring and brings wiretapping and other electronic eavesdropping fully within the purview of the Fourth Amendment" (*id.*, at p. 1055). Mr. Justice Douglas then immediately adds (*ibid*):

> "• • • I also join the opinion because it condemns electric surveillance, for its similarity to the general warrants out of which our Revolution sprang and allows a discreet surveillance only on a showing of 'probable cause.' These safeguards are minimal if we are to live under a regime of wiretapping and other electronic surveillance."

And then, recurrently throughout his concurring opinion, Mr. Justice Douglas continues to speak undifferentiatedly of telephone wiretaps and other electronic eavesdropping (*id.*, pp. 1056-1057).

(8) In the concurring opinion of Mr. Justice Stewart (18 L. Ed. 2d at pp. 1057-1058), we again find undifferentiated references, throughout, to the Fourth Amendment formulation of the electronic eavesdropping issues presented by §813-a; and reference also to "electronic eavesdropping for a 60-day period" as involving "a broad invasion of a constitutionally protected area" which ["o]nly the most precise and rigorous standard of probable cause should justify" (*id.*, p. 1058). It is noteworthy that the *ratio decidendi* of Mr. Justice Stewart's concurring opinion was the Fourth Amendment inadequacy of the *Berger* affidavits in support of the permissive *ex parte* judicial eavesdrop orders—a point which is importantly involved also in the within appeal of Dr. Cohen (printed brief of the appellant herein at pp. 45 et seq.).

(9) In the dissenting opinion of Mr. Justice Black (18 L. Ed. 2d at 1059-1069), it is stated that "the Court • • • holds the New York eavesdropping statute *on its face* violative of the Fourth Amendment" (*id.*, at 1059—italics in original). Mr. Justice Black also formulates what he terms the Court's "syllogism" at *id.* pp. 1062-1063, in which telephone wiretapping and other electronic eavesdropping are expressly included by Mr. Justice Black as being undifferentiated for Fourth Amendment purposes. Mr. Justice

Black also expresses his dissent from the Court's effective overruling of *Olmstead*, a telephone wiretapping case (*id.*, at pp. 1063-1065).

(10) In the dissenting opinion of Mr. Justice Harlan (18 L. Ed. 2d at pp. 1069-1080), there occurs the very interesting point or reference that in this very case of Dr. Cohen, Mr. Justice Rinaldi (in granting the motion to suppress evidence) had emphasized the stringent (as viewed by Mr. Justice Harlan) requirements of §813-a in regard to *ex parte* judicial orders for telephone wiretaps; and, Mr. Justice Harlan observes, " • • • there was no suggestion there or elsewhere that eavesdropping orders [as distinct from telephone wiretap orders] should be differently treated" (*id.*, at pp. 1071-1072). We respectfully emphasize this item in Mr. Justice Harlan's dissenting opinion as having a really quite striking importance for our present application for reargument, i.e., is it not striking that Mr. Justice Harlan's dissent in *Berger* invoked the facts and the law of this very case of Dr. Cohen with a view to showing that (in Mr. Justice Harlan's view) the New York permissive eavesdropping legislation is satisfactory for room "bugging" purposes because the New York State Courts treat room "bugging" under the same standards of Fourth Amendment care as they treat telephone wiretapping. It would be hard to imagine a more vivid formulation, by a Judge (of the highest Court in the land) of the total identity or assimilativeness of telephone wiretapping and electronic room "bugging" within the meaning of §813-a, than this reasoning of Mr. Justice Harlan's.

(11) Another item in Mr. Justice Harlan's dissenting opinion deserves special attention. This is the item, referred to previously, which relates to the pick-up in the Neyer room eavesdrop (in the *Berger* case) of the telephone conversation between Neyer and Berger. Mr. Justice Harlan treated this item as having Fourth Amendment significance in the *Berger* case, and he did so moreover in

deciding the delicate and difficult issue of Berger's "standing" to raise the Fourth Amendment issue with respect to the Neyer eavesdrop (18 L. Ed. 2d at pp. 1078-1079).

(12) Finally, in the dissenting opinion of Mr. Justice White in *Berger* (18 L. Ed. 2d at pp. 1080—et seq.), the Justice (adhering to the same consistent theme above noted) views the majority opinion as amounting to an undifferentiated constitutional condemnation of the New York permissive eavesdrop statutes for all types of electronic surveillance or search. See *id.* at p. 1083. And see especially, at *id.* p. 1084, the following:

> "• • • today's majority does not, in so many words, hold that all wiretapping and eavesdropping are constitutionally impermissible. But by transparent indirection it achieves practically the same result by striking down the New York statute • • •."

On the same page (1084), and again on p. 1086, Mr. Justice White repeats his protest against the Majority's undifferentiated constitutional condemnation of wiretapping and other electronic eavesdropping in the state statutory setting of the *Berger* case.

CONCLUSION

It is respectfully submitted that, on the basis of the grounds and reasons set forth in this brief and in the within motion papers, the motion for reargument should be granted in all respects.

Respectfully submitted,

KLEINMAN, GOLD & LANDSMAN
Attorneys for Appellant-Movant
Carl I. Cohen

EUGENE GOLD
Of Counsel

Appendix SC, Appellant's Brief on Re-Argument in New York Court of Appeals

Appendix 5C. Appellant's Brief on Re-Argument in
[redacted]w York Court of Appeals

Court of Appeals

State of New York

Appeal No. 223 **(Decided July 7, 1966)**

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—against—

CARL I. COHEN,

Appellant.

APPELLANT'S BRIEF ON RE-ARGUMENT

KLEINMAN, GOLD & LANDSMAN
Attorneys for Appellant-Movant
Carl I. Cohen
66 Court Street
Brooklyn 1, New York

Of Counsel:
EUGENE GOLD

32 CASE PRESS INC., 421 HUDSON ST., N.Y.—ORegon 5-4540

INDEX

PAGE

Statement; The Questions Presented in This Re-Argument 1

ARGUMENT:

POINT I—Introductory to argument: the indicated or possible effects of the *Katz, Berger and Kolod* (*Alderisio*) decisions of the United States Supreme Court, and of the *Kaiser* (and *Morhouse* and *Sarisohn*) decisions of this Court, as applied to the present appeal and reargument 4

People v. *Kaiser* 4

People v. *Morhouse* 5

People v. *Sarisohn* 5

Katz v. *United States* 7

The *Berger* Decision 10

Kodol, Alderisio, et al. v. *United States* 11

Osborn v. *United States* 13

POINT II—

A. Irrespective of the "retroactivity" problem as applied to this case, the wiretapping at issue here should be invalidated and the wiretap evidence suppressed, because under the pre-*Berger* standards of the law of search and seizure in this State and under Art. I, Sec. 12 of the New York Constitution and §813a of the Code of Criminal Procedure, this wiretapping was unlawful 14

PAGE

B. Notwithstanding this Court's decisions in the recent *Kaiser* and *Morhouse* cases, the Court should now unequivocally rule, that official telephone wiretapping by New York State governmental personnel must comply with the Federal Fourth Amendment, in view of the decision of the United States Supreme Court in the *Katz* case 14

C. The Court should also now rule that the *Berger* and *Katz* decisions are applicable in deciding this appeal and reargument 14

POINT III—Appellant Cohen respectfully renews his contentions in the appeal herein as to the mutual or inter-active taint as between the wiretap evidence and the search-obtained evidence; he also respectfully renews his contention as to the over-all circumstances of the conduct of the police which violated his constitutional rights in connection with the wiretap, the search, the spoliation of evidence, and the resort to indecent methods of investigation 35

CONCLUSION 36

Court of Appeals

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—against—

CARL I. COHEN,

Appellant.

APPELLANT'S BRIEF ON RE-ARGUMENT

Statement; The Questions Presented in This Re-argument

By order of December 29, 1967 this Court granted the appellant's motion for re-argument of this appeal.

The motion for re-argument urged that the decision of the Supreme Court of the United States in *Berger* v. *New York*, 388 U.S. 41, 18 L.Ed. 2d 1040, decided June 12, 1967, had the necessary effect of voiding ex parte court orders authorizing telephone wiretapping under Code Crim. Proc. §813-a, including the wiretap order at issue in the present case.

The telephone wiretap issue is presented in this case in the following way: The appellant, Carl I. Cohen, is a physician. In December 1960 Dr. Cohen was indicted in Kings County for abortion (5 indictments) (R. 7 et seq.). On July 28, 1960 an ex parte court order had been issued for the tapping of Dr. Cohen's office telephone in Brooklyn (R. 21-22). The telephone was tapped continuously from July 29

to September 2, 1960 (R. 563). On the night of September 2-3, 1960 Dr. Cohen was arrested in Queens, and his home in Queens and office in Brooklyn were searched (R. 563).

A motion to suppress evidence obtained by the search and the wiretap was granted after a hearing by Mr. Justice Rinaldi, Supreme Court, Kings County (42 Misc. 2d 403). On appeal by the People to the Appellate Division, Second Department, Justice Rinaldi's order of suppression was affirmed as to the search but modified so as to reinstate the wiretap evidence (24 A.D. 2d 900). Dr. Cohen then appealed, by leave, to this Court, requesting invalidation of the wiretap, but this Court affirmed the judgment of the Appellate Division without opinion, Chief Judge Desmond and (then) Judge Fuld dissenting (18 N.Y. 2d 650). It is the latter decision of the Court which is now before the Court for reargument. (The Supreme Court denied certiorari (385 U.S. 976, December 5, 1966; reh. Den. 385 U.S. 1032, January 16, 1967) "for want of a final judgment.")

It appears that, owing to supervening circumstances, the points or questions which need to be considered in this reargument go beyond the question only of whether *Berger* v. *New York, supra,* has the effect of voiding Code Crim. Proc. § 813a as a basis for telephone wiretap orders in this State, or whether the *Berger* case has made all State wiretapping subject to the Fourth Amendment—these last being the questions immediately comprehended within our motion for reargument. The supervening or intervening circumstances just referred to have been this Court's decisions in the *Kaiser, Morhouse* and *Sarisohn* cases, *infra,* decided December 15, 1967, the decision of the Supreme Court of the United States in *Katz* v. *United States,* decided December 18, 1967, (36 U.S. Law Week 4080), and that Court's decision in *Kolod, Alderisio et al.* v. *United States,* decided January 29, 1968 (36 U.S. Law Week 3302). Our motion for reargument had been made returnable before this Court on September 25, 1967. The granting of the motion (De-

cember 29, 1967) came after all of the decisions just mentioned except *Kolod-Alderisio*. Of those intervening decisions *Kaiser* and *Katz* affect this reargument most acutely —*Kaiser*, because although deciding that *Berger* is not retroactive, it (*Kaiser*) was nevertheless followed within a few weeks by the granting of this reargument; and *Katz* because, coming shortly after *Kaiser* and evidently leaving no further doubt that State telephone wiretapping is subject to the Fourth Amendment, it (*Katz*) too was followed by the granting of this reargument.

In our treatment in this brief of the respective effects of the above mentioned decisions—chiefly *Berger*, *Kaiser* and *Katz*—we shall discuss those effects from the three aspects of the wiretap constitutionality issues which are presented by the record of our case, namely, (1) the Federal (Fourth Amendment) and the State constitutional adequacy of the affidavits to support the instant ex parte wiretap orders, (2) the Federal (Fourth Amendment) and State constitutional adequacy of the ex parte order itself, and (3) the Federal (Fourth Amendment) constitutional adequacy of the statutory (§ 813a) and constitutional (Article I, § 12) provisions of this State permitting ex parte wiretap orders. A fourth question necessarily presented is, of course, the question of retroactivity of *Berger* and *Katz* both as a question generally affecting New York State wiretap orders and prosecutions based on wiretap evidence, and as a question specifically affecting the wiretap issues in this case.

We would respectfully note that this reargument proceeding, in which two of the most fundamental reargument factors connoted within this Court's Rule XX are presented —"supervening and inconsistent decisions of the United States Supreme Court", and "questions of profound public interest"*—presents also the situation which, we take

---

* *Cohen and Karger, Powers of the New York Court of Appeals* (Rev. Ed.), p. 697.

it, falls literally within the words of Rule XX, i.e., an overlooking or misapprehending of points owing to insufficiently sharp prior presentation of the points by the parties.* In particular, counsel for appellant Cohen deem that we may not have previously presented to this Court with sufficient sharpness the question of the Federal (Fourth Amendment) and State constitutional adequacy of the ex parte wiretap order itself, as distinct from the affidavits submitted in support of the application for the order and the issues of probable cause and scope and execution of the wiretap- "search" in light of this State's own Constitution and this Court's decisions on search and seizure.

ARGUMENT

POINT I

Introductory to argument: the indicated or possible effects of the *Katz*, *Berger* and *Kolod (Alderisio)* decisions of the United States Supreme Court, and of the *Kaiser* (and *Morhouse* and *Sarisohn*) decisions of this Court, as applied to the present appeal and reargument.

People v. Kaiser

This Court's reasoning in *Kaiser* was essentially, that if *Berger* is to be read as covering State telephone wiretapping, such effect of *Berger* shall operate in this State only prospectively, this rule of prospectivity moreover being formulated by this Court not in terms of post-*Berger* trials or prosecutions (or appeals) involving issues of wiretap evidence, but in terms of post-*Berger* wiretap

---

* Cf. *United States Supreme Court Rule 58 (2) (Rehearing)*, referring to "substantial grounds available to petitioner although not previously presented".

orders, i.e., wiretap orders issued prior to the *Berger* decision shall not be deemed affected by that decision.

We read the *Kaiser* decision as at least expressing doubt concerning, or as leaving open, the question of whether *Berger* did affect State telephone wiretapping either decisionally or by enunciation of a controlling principle.

Under a separate heading, *infra*, we treat the question of *Berger's* (and of *Katz's*) retroactivity or prospectivity. Also, under our separate treatment of *Katz*, *infra*, we take up the question of whether, irrespective of the meaning derivable from *Berger* standing alone, the further meaning derivable from *Katz* as supplementing *Berger* requires the conclusion that State telephone wiretapping must comply with the Fourth Amendment. And in our detailed treatment *infra* of this Court's construction of the New York Constitution the *Kaiser* case is further extensively discussed.

People v. Morhouse

People v. Sarisohn

Insofar as relevant to this reargument—and bearing in mind that in this introductory portion of our argument in this brief we are only summarizing the principal recent decisions of this Court and the United States Supreme Court which may affect this case, specific points in those decisions being more fully treated in appropriate connections *infra*—*People* v. *Morhouse*, No. 406-67, held that Morhouse was entitled to a full evidentiary hearing as to certain ex parte orders for room bugging and wiretapping which Morhouse was found to have standing to challenge. However, this Court also held in *Morhouse*, following its *Kaiser* ruling as to non-retroactivity of *Berger*, that in the remand hearing the eavesdropping and the ex parte orders in *Morhouse* should be tested by "standards reasonably believed applicable at the time such orders were obtained and this conduct occurred," not "upon the basis of refinements in criminal procedure only recently formulated by the United

States Supreme Court and not at all related to the 'integrity of the fact-finding process' ". The Court in *Morhouse* also stated that "if the Court orders authorizing these eavesdrops were improperly issued *or executed* even under the law as it was then understood" tainted evidence thereby obtained must result in vacating the conviction. (Emphasis supplied*)

The *Morhouse* decision also dealt with an issue of lack of full disclosure by the prosecution concerning its eavesdropping activities—a similar question is presented in our case since we contend that the police have spoliated important evidence and have refrained from making disclosures which would or might reveal that the wiretap evidence and the illegal search-obtained evidence in our case are so interwoven as to taint the wiretap evidence for that reason alone.

Chief Judge Fuld and Judges Bergan and Christ dissented in *Morhouse* on the last mentioned point (*inter alia*) as to non-disclosure by the People. Chief Judge Fuld also joined in Judge Christ's dissent from the Court's refusal to apply *Berger* retroactively to the *Morhouse* case.

The herein relevant rulings of this Court in *Matter of Sarisohn*, No. 422-67, were that certain telephone wiretap evidence was disapproved for insufficiency in the ex parte affidavits, which were merely of "standard-form" and failed to specify facts on which the Judge exercising discretion could act; that the situation in that respect in *Sarisohn* did not meet the standards of *People* v. *McCall*, 17 N.Y. 2d 152, or of the *Kaiser* case; and that supplementary oral statements under oath by the police officer to the issuing Justices were not curative because they were not recorded and hence did not become part of the record basis of the orders. Chief Judge Fuld, concurring in *Sarisohn*,

---

* We have emphasized the words "or executed" in the above quotation because we believe an important issue thereby suggested is presented in this reargument (*infra*).

again stated his position that the *Berger* case had outlawed wiretapping under § 813-a.

Katz v. United States

The Supreme Court of the United States decided the *Katz* case on December 18, 1967; as mentioned, this was subsequent to the *Kaiser, Morhouse* and *Sarisohn* decisions of this Court. *Katz* involved an electronic device attached to the outside of a public telephone booth. No "trespass" and no "physical penetration" of a "constitutionally protected area" was involved. The Court in *Katz* was faced, therefore, with the unqualified question whether electronic eavesdropping is an invasion of Fourth Amendment-protected privacy regardless of the physical manner in which the eavesdropping is done. The decision in *Katz* was that all electronic eavesdropping is subject to the Fourth Amendment—not just "trespassory" etc. activity as was involved on the facts in *Berger*. If there were any doubt that *Katz* of necessity has ended the immunity of State telephone wiretapping to the restrictions of the Fourth Amendment, the doubt is ended when one considers that in addition to the sweeping and unqualified way in which the Court speaks throughout the *Katz* opinion of official electronic search of human conversation as being governed by the Fourth Amendment, the Court has expressly overruled *Olmstead* v. *United States*, 277 U.S. 438; and that in declaring that "the Fourth Amendment protects people, not places", the Court has applied this to the facts of the *Katz* case in language unmistakably denoting Fourth Amendment protection for telephone privacy:—

> "* * * a person in a telephone booth may rely upon the protection of the Fourth Amendment. One who occupies it, shuts the door behind him, and pays the toll that permits him to place a call, is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the

> Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication."

It was immediately after stating the above in the *Katz* opinion that the Court went on to discuss the *Olmstead* case, *supra*. It will be recalled that the *Olmstead* case has stood since 1928 as the authority commonly invoked by proponents of State telephone wiretapping for the proposition that such State activity is not governed by the Fourth Amendment, *Olmstead* having held that Federal wiretapping was not so governed,* and hence the inference having been drawn *a fortiori* that State wiretapping was not so governed. *Katz* has put an end to *Olmstead*. We quote the pertinent portions of the *Katz* opinion (including the Court's footnotes) (36 U.S. Law Week at 4081):

> "The Government contends, however, that the activities of its agents in this case should not be tested by Fourth Amendment requirements, for the surveillance technique they employed involved no physical penetration of the telephone booth from which the petitioner placed his calls. It is true that the absence of such penetration was at one time thought to foreclose further Fourth Amendment inquiry, *Olmstead* v. *United States*, 277 U.S. 438, 457, 464, 466; *Goldman* v. *United States*, 316 U.S. 129, 134-136, for that Amendment was thought to limit only searches and seizures of tangible property.[18] But '[t]he premise that property interests control the right of the Government to search and seize has been discredited.' *Warden* v. *Hayden*, 387 U.S. 294, 304. Thus, although a closely divided Court supposed in *Olmstead* that surveillance without any trespass and without the

---

* Congress' subsequent enactment of Section 605 of the Federal Communications Act (Title 47, U.S.C.) was its response to the *Olmstead* ruling that Federal wiretapping was outside any ban of the Fourth Amendment.

seizure of any material object fell outside the ambit of the Constitution, we have since departed from the narrow view on which that decision rested. Indeed, we have expressly held that the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements, overheard without any 'technical trespass under . . . local property law.' *Silverman* v. *United States*, 365 U.S. 505, 511. Once this much is acknowledged, and once it is recognized that the Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.

We conclude that the underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling. The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance.

[18] See *Olmstead* v. *United States*, 277 U.S. 438, 464-466. We do not deal in this case with the law of detention or arrest under the Fourth Amendment."

From the above quotation it will be seen that the overruling of *Olmstead* by *Katz* is done so unqualifiedly, and with such circumstantial reference to the chain of reasoning in *Olmstead*, as to justify our earlier statement that the pronounced constitutional doom of Fourth-Amendment-free State wiretapping can no longer be doubted.

Continuing our summary of the relevant rulings in the *Katz* case, it is to be noted next that the Court there has in effect approved a judicial warrant procedure for electronic eavesdropping in appropriate circumstances satisfying the tests of the Fourth Amendment. In this respect *Katz* carries forward the concept of such a warrant procedure which first saw specific fruition in *Osborn* v. *United States*, 385 U.S. 323, where the Supreme Court approved a minifon-type surveillance on the basis of an exceptionally careful and discriminate prior judicial permission. *Osborn*, then *Berger*, and now *Katz* have thrown considerable light on what the Supreme Court considers to be an adequate Fourth Amendment judicial warrant procedure for electronic "search and seizure" of human conversation.

Further details as to the standards which the Supreme Court has enunciated for the purposes of such a Fourth Amendment judicial warrant procedure in the field of official electronic eavesdropping are taken up *infra* in other connections. We would mention here that a foremost theme which we shall be asking this Court to take into consideration in deciding this reargument is that, once Fourth Amendment standards of probable cause and the manner of executing the search and the like standards of our own State Constitution are held applicable to electronic eavesdropping including wiretapping, effective analysis of the constitutional adequacy of a particular ex parte court wiretap order is not significantly affected by distinctions of policy as between retroactive or prospective application of a decision like *Berger* or *Katz*.

Concluding this summary of the *Katz* decision, we note that the Court there had words to say also about the problem of retroactivity. This topic needs to be separately treated in this brief, and we do so in Point II, *infra*.

The *Berger* Decision

In our printed motion for reargument herein we quoted and discussed the majority, concurring and dissenting opin-

ions in *Berger* v. *New York*, 388 U.S. 41, 18 L.Ed.2d 1040, from the standpoint of whether that case, in declaring that §813-a on its face violates the Fourth and Fourteenth Amendments, applies to telephone wiretapping and not only to room bugging. In *People* v. *Kaiser*, this Court's decision No. 470-67, which we discuss separately *infra* as to all of its rulings and reasoning relevant to this reargument, we note here that this Court took the view that it is at least doubtful whether *Berger* covers telephone State wiretapping. We proceed in this brief on the assumption that as of the time of this Court's decision in *Kaiser*, the Court was not convinced that the Supreme Court of the United States in *Berger* had either struck down §813-a as applied to State wiretaps, or had (expressly or impliedly) made State telephone wiretapping subject to the Fourth Amendment.

We do not here repeat our analysis of the *Berger* decision as set forth in our printed motion for reargument because the essential object of that analysis—to show that the Supreme Court of the United States now treats or is prepared to treat State telephone wiretapping as being subject to the Fourth Amendment—must now be supersedingly viewed anew in light of *Katz* v. *United States, supra;* we further discuss the *Katz* case below.

Kodol, Alderisio, et al. v. United States

The above entitled decision of the Supreme Court of the United States, rendered January 29, 1968, *per curiam*, No. 133, October Term, 1967, 36 U.S. Law Week 3306, in which certiorari had previously been denied (389 U.S. 834), is the most recent of the decisions which we are treating in this introductory point of our argument. The Court set aside the previous denial of certiorari, granted certiorari, vacated the judgment of the United States Court of Appeals, and remanded to the District Court for further proceedings consistent with the *per curiam* opinion. The facts in *Kodol-*

Alderisio which brought about this result were a new disclosure that unlawful electronic eavesdropping had occurred at Alderisio's place of business; that the Solicitor General contended the eavesdropping had produced nothing which, under standards set up and administered by the Department of Justice itself, "is arguably relevant to the litigation involved"; and that the Supreme Court declined to allow the Department of Justice to be its own judge, unilaterally, of what "is arguably relevant" in evidence obtained by unlawful electronic eavesdropping, but that this must be decided by a Court after a full judicial hearing.

The *Kodol-Alderisio* case has additional importance because the problem of whether or not to apply the *Berger* case (and now the *Katz* case as well) on a retroactive basis can not be solved without taking into account a quite recent practice shortly antedating the *Berger* decision of the Supreme Court known as the "*Schipani* review procedure" of which *Kodol-Alderisio* is the latest example. This "*Schipani* review procedure," fully described in Point II of this brief, *infra*, is a procedure which was initiated in *Schipani* v. *United States*, 385 U.S. 372, 17 L.Ed.2d 428, decided December 12, 1966, whereby the Department of Justice has been systematically disclosing all instances in which Federal criminal prosecutions are or have been dependent on unlawful or questionably lawful electronic eavesdropping in whole or in part, so that the Courts may take appropriate corrective measures for the vacating of convictions or for the holding of evidentiary hearings with a view to such vacating or to dismissal of pending indictments. The *Kodol-Alderisio* ruling handed down by the Supreme Court on January 29, 1968, that the "*Schipani* review procedure" continues very much alive, signifies in the plainest way that the Supreme Court of the United States is far indeed from confining its recent electronic eavesdrop decisions such as *Berger* and *Katz* to a merely prospective operation.

Osborn v. United States

Osborn v. *United States*, 385 U.S. 323, 17 L.Ed. 2d 394, decided December 12, 1966—the same day as *Schipani*, *supra*—and thus antedating *Berger* by some six months, will undoubtedly be regarded by future legal historians as marking, together with the *Schipani* case, the first systematic step by the Supreme Court of the United States in bringing the laws of electronic physics into realistic conformity with the law of the Fourth Amendment.* *Osborn* contains the first intimation, in any case decided by the Supreme Court, that official electronic surveillance claimedly violative of the Fourth Amendment may pass constitutional muster if the officials involved have first obtained appropriate judicial permission in the nature of a "search warrant" issued on probable cause. This warrant procedure for official electronic "searches" has, since *Osborn*, been much more thoroughly worked out by the Supreme Court, in its *Berger* and *Katz* decisions, *supra*. (The entire herein relevant impact of *Osborn* (in relation to *Berger* and *Katz*) is taken up in Point II *infra*.)

* * * * *

By way of completing the chronology of the present record posture of this case as it now comes before this Court on reargument, it is to be noted that, while the Supreme Court denied certiorari (385 U.S. 976, December 5, 1966; reh. den. 385 U.S. 1032, January 16, 1967), of this Court's affirmance of the Appellate Division (18 N.Y. 2d 650), the denial of certiorari was "for want of a final judgment".

---

* Preceding *Osborn* and *Schipani* was *Black* v. *United States*, 385 U.S. 26, 17 L.Ed. 2d 26, decided November 7, 1966, which we further treat in Point II, *infra*, in connection with our more complete discussion of the "*Schipani-review* procedure."

POINT II

A. Irrespective of the "retroactivity" problem as applied to this case, the wiretapping at issue here should be invalidated and the wiretap evidence suppressed, because under the pre-*Berger* standards of the law of search and seizure in this State and under Art. I, Sec. 12 of the New York Constitution and §813a of the Code of Criminal Procedure, this wiretapping was unlawful.

B. Notwithstanding this Court's decisions in the recent *Kaiser* and *Morhouse* cases, the Court should now unequivocally rule, that official telephone wiretapping by New York State governmental personnel must comply with the Federal Fourth Amendment, in view of the decision of the United States Supreme Court in the *Katz* case.

C. The Court should also now rule that the *Berger* and *Katz* decisions are applicable in deciding this appeal and reargument.

As the Court will have gathered from our above grouping of points under this heading, we respectfully consider that these several contentions or suggestions may be most helpfully presented in combination with each other. Nevertheless, in the presentation which now follows, we shall try insofar as possible to avoid unnecessary blurring of the lines of argument.

As regards our above subheading "A"—urging that this State's own pre-*Berger* standards of search and seizure as applicable to telephone wiretapping require disapproval of the wiretapping done in the present case—a comparison of the record features of this wiretap with the record features of the wiretaps in the *Kaiser*, *Morhouse* and *Sarisohn* cases in the light of the standards applied by this Court in those cases, is instructive.

The pertinent record facts of the present wiretap were described and discussed at length in appellant Cohen's printed brief in the present appeal, at pp. 13-25, 45-59. The ex parte wiretap application and supporting affidavit appear at R. 23-29. The ex parte wiretap order appears at R. 21. The following features of the instant wiretap situation are relevant to this reargument and should be viewed with an eye to the *Kaiser, Katz* and *Berger* decisions;

(1) The application for the ex parte order consisted of an affidavit by Assistant District Attorney Kenneth J. McCabe and two informants, Alvin G. Rosen and Audrey Saltzman. The application was made on July 28, 1960, the order was granted the same day, and the wiretapping was done from July 29 to September 2, 1960 on Dr. Cohen's office telephone, a period of 36 days. (See R. 21-29, 563).

(2) The McCabe affidavit (R. 23-25) contained all of the allegedly material information, the affidavits of the informers Rosen and Saltzman having been merely conclusory confirmations of Mr. McCabe's affidavit (R. 26-29), and stating that the information given by each of the informers to the police was their own "experience" and from conversation Audrey Saltzman allegedly had with one Irma Wertheimer. The McCabe affidavit averred that it was made upon *information and belief* and upon the annexed affidavits of Rosen and Saltzman, and that the sources of the information and the grounds of the belief were those *"annexed affidavits, the record and files of his office and information supplied to deponent by the detective's squad attached to the office of the District Attorney, Kings County"* (Emphases added).

(3) The terms of the ex parte wiretap *order* itself (R. 21), as distinct from the application or affidavits, authorized tapping "of any and all telephone communications made to and from" Dr. Cohen's office telephone. Thus, the order did not specify or discriminate in any way as to which con-

versations might be "seized", but allowed a blanket "seizure" of any and all conversations on the telephone in Dr. Cohen's office. Nor, did the order refer to any specific alleged abortion as to which seizure of telephone conversation should be authorized and confined; *there is not the slightest intimation in the order or the affidavit that any conversation at all would take place concerning past or presently being committed abortions.* Nor, since (again) there had been no verbal testimony supplementing the application, can the order be construed as having constructively incorporated any limitation or specification derivable from any such verbal testimony.

(4) The scope and manner of *execution* of the actual carrying out of the wiretapping was a continuous performance from July 29 to September 2, 1960. The wiretapping was not only continuous, it was indiscriminate, saturational, literally total, in its dragnet "search and seizure" of incoming and outgoing telephone calls on the appellant physician's office telephone for a period of about five weeks. Some idea of the indiscriminate and total nature of this eavesdropping may be had from the District Attorney's statements, while resisting our demand for the production of the taped conversations, that the taps had "relation to matters completely unrelated to this case" (R. 69), "this investigation went well and beyond just the eight women who are named in these indictments * * * certain information was obtained relevant to other persons but they are persons whose cases will not be before the Court" (R. 75), "the tremendous volume of telephone conversations that took place just over the wire from the doctor's office phone would require approximately six months to transcribe" (R. 77), "there are about forty records. Each one would take two hours to hear" (R. 77). And this prodigious, indiscriminate wiretapping took place, it will be remembered, on a telephone which carried, for the five weeks involved, innumerable confidential professional conversations be-

tween a physician and hundreds of his female patients, only a minute fraction of whom are alleged to have been the subject of "crime"—and those few only after the dragnet had operated for five weeks. In the light of decisions like *Kaiser*, *Osborn* and *Katz* (see further discussion of those cases *infra*) which so meticulously point to utmost selectivity and discreet limitation as necessary to justify electronic "search and seizure" of conversation, the wiretapping in the present case is practically a laboratory example of what this Court and the Supreme Court inferentially condemned in those cases by enunciating the standards of constitutional acceptability illustrated by the fact of those cases.

(5) *The affidavits were the only showing made before the Judge in applying for the wiretap order. No supplemental or confirmatory verbal proof was submitted to the issuing Judge. At least, if there was any such, there was no record made thereof.*

(6) The "information" recited in the McCabe affidavit was that Irma Wertheimer in July or August of 1958 (2 years before the wiretap order was sought) being pregnant, "obtained information" that a criminal abortion could be performed upon her by the within Dr. Cohen; that shortly thereafter she went to Dr. Cohen's office with her husband Milton Wertheimer and had an abortion done for $500; that in July or August of 1959 Irma Wertheimer, being again pregnant, this time from intercourse with her boyfriend Constantine Triges, she and Triges went to Dr. Cohen's office where they paid him $400. for performing an abortion; that again in October or November 1959 Irma and her boyfriend Triges went to Dr. Cohen's office where they paid him $400. for performing another abortion; that during the first week of February 1960 (6 months before the wiretap order was sought) Audrey Saltzman, believing herself pregnant, consulted with her girlfriend Irma Wertheimer regarding Dr. Cohen, Audrey and Alvin G. Rosen went to Dr. Cohen's office, Rosen had $750. with him, Dr.

Cohen examined Audrey and advised she was pregnant, he demanded $900. to perform an abortion, as Rosen only had $750. with him they left his office and Dr. Cohen did not perform an abortion because thereafter they claim, Audrey's menstrual cycle came about naturally and they had no reason to return. *No affidavit was obtained from Irma or Milton Wertheimer, or from Constantine Triges, and the affidavits do not contain one word that the Wertheimer information was verified by anyone.**

(7) The affidavits contain nothing concerning the reliability of Rosen and Saltzman as informers and the Judge who signed the wiretap order had no information from which he could determine their reliability.

(8) The affidavits also show on their face that all of the alleged information concerning Irma Wertheimer was hearsay to Rosen and Saltzman and at least double hearsay to the police and the District Attorney. As for the item in the McCabe affidavit about Rosen's and Saltzman's own alleged visit to Dr. Cohen's office, this would scarcely rank as "reasonable grounds" since all that allegedly occurred was a conversation about an abortion, but no abortion. The police testimony in the suppression hearing before Mr. Justice Rinaldi revealed that the hearsay character of the affidavits was even more attenuated than appeared from the affidavits themselves because the police evidently got their whole story from Rosen rather than from his girlfriend Miss Saltzman, so that all of the alleged police information about Miss Saltzman's friend Irma Wertheimer (from whom no affidavit was obtained) came to them by *triple* hearsay (R. 119-132, 151-162, 241-247). Indeed, since Mr. McCabe in turn got his information from an unspecified police or detective source, or for all that appears, from *a chain* of such sources, the case is one *of at least quadruple* hearsay.

---

* As a matter of fact, there is no charge against the Doctor based on the alleged Wertheimer abortions, nor surprisingly the alleged Saltzman incident.

(9) Besides all of this, the alleged happenings mentioned in the McCabe affidavit long antedated the wiretap application which was made at the end of July 1960. The alleged Irma Wertheimer incidents were in the summer of 1958, the summer of 1959 and the fall of 1959, and the inconclusive alleged Saltzman-Rosen incident was six months prior to the wiretap application. Nevertheless, Mr. McCabe's affidavit, which was sworn to July 27, 1960, concluded that by reason of the aforesaid there was "reasonable cause to believe that evidence of the crime of criminal abortion may be obtained if telephone messages were to be intercepted" on Dr. Cohen's office telephone.

(10) Nowhere in the application for the wiretap order was there any claim of exigency or of emergency need to tap Dr. Cohen's office telephone.

(11) Nor did the application define or discriminate or specify in any way what were the particular conversations to be eavesdropped (or "seized").

(12) Nor did the application contain anything whatever to support the contention either that evidence of any alleged past-committed abortion would be found, or that evidence of any current or "present" crime of abortion would be found—all of the allegations having related, as seen, to stale, long past alleged happenings.

We turn now to a closer examination of this Court's decisions in *Kaiser, Morhouse* and *Sarisohn,* against the background of the above enumerated record features of the telephone wiretapping involved in the present case.

In the *Kaiser* decision, we respectfully call attention to the following:—The Court began by describing in detail the criminal conduct of the defendants which necessitated the wiretapping as a matter of literal emergency for the protection of human life against outrageous threats of brutal assault in aid of attempted extortion. The Court then also specifically noted and emphasized that these facts had been

presented to the Judge before whom the application for the wiretap order was made, including sworn verbal testimony—all pointing, moreover, to the then immediate or imminent actuality of the crime as being one which the wiretapping would reveal *in flagrante*, a classic instance of how electronic eavesdropping can be specifically and adequately shown in advance to be aimed at the actual apprehending of a criminal in the "present commission" of the specifically pre-described offense. The Court then went on to note that the wiretap order specifically referred to telephone communications of two of the accused persons over a telephone which demonstratedly had been tracked down as one from which the brutal threats had been made in the immediately preceding period. The Court then noted that the wiretap order was effective commencing July 1, 1964, and that on the evening of July 3 and morning of July 5 the operative conversations were recorded.

The Court in *Kaiser*, after other recitals not here relevant, then mentioned the *Berger* decision and appellant Kaiser's contention that by reason of *Berger* the wiretapping in his case must be suppressed because the underlying statute (§ 813-a) had been declared void on its face in *Berger*. The Court then indicated its doubts that *Berger* applied to wiretapping as distinct from room bugging.

Then the Court in *Kaiser* proceeded to the important point that, "The Constitution and laws of this State, however, place severe restraints on the right of public officials to obtain evidence by wiretapping", the Court quoting Article 1, §12 of the State Constitution, and referring also to §813-a, and §738 of the Penal Law, as having "supplemented the provisions of the Constitution", with particular reference to eavesdropping "without the consent of one of the parties to the conversation".*

---

* It will be recalled that none of the wiretapping in our case is claimed by the People to have been done with the consent of any conversing party.

The Court in *Kaiser* then cited and discussed *People* v. *McCall*, 17 N.Y.2d 152, as having held that §813-a requires "the same factual basis to be shown for the issuance of the eavesdropping order 'as in the case of search warrants' "; and that in *McCall*, "relying upon cases in which we held affidavits to be insufficient in ordinary search warrant cases, we held that the wiretap evidence should have been excluded". The Court in *Kaiser* also referred to *People* v. *McDonnell*, 18 N.Y.2d 509, and the *Sarisohn* case, as likewise illustrating, respectively, "the same constitutional standards governing ordinary searches" as applicable to wiretap cases, and that in such cases the Court "strictly adhere[s] to" those standards.

Then, especially significant, the Court in *Kaiser* went on to emphasize, referring to Mr. Justice Brennan's dissenting opinion in the *Lopez* case as to the Fourth Amendment's requirement of "antecedent justification before a Magistrate [as] * * * a precondition of electronic surveillance", that it is "clear" that in this State "no wiretap or bugging order could issue except upon an adequate factual showing, i.e., probable cause to believe that a crime *had been committed* and that the conversations *particularized in the order* would be seized". (Emphasis supplied)

Then in *Kaiser*, referring to the wiretap order in that case and to the above quoted Fourth Amendment requirement of probable cause and particularizing of the conversations to be seized as required by our own State Constitution and §813-a, the Court further stated, "With this requirement as with all the requirements of the statute the order in question complied". And then the Court in *Kaiser* specifically noted that verbal sworn testimony before the issuing Judge "clearly indicates that there was probable cause to believe that a crime *was being committed* and that *the conversations* regarding threats to Mr. Holtzman and his family *would be obtained*". (Emphasis supplied)

The Court in *Kaiser* next noted that while "the order" did not "adequately specify the precise conversations" au-

thorized to be seized, the sworn testimony, which "becomes part of the order," did so specify; also that while the order in *Kaiser* was not "sufficiently limited in time", the actual seizure of conversations "came within a limited period of three days"; also that while "no exigent circumstances were alleged for dispensing with the notice requirement", nevertheless "those circumstances were present here" within the meaning of the Supreme Court's search and seizure decisions.

The Court in *Kaiser* then pointed out that the reason for these "defects" in the *Kaiser* wiretap procedure were that there had been no previous decision setting up those requirements prior to *Berger*. But, we would here note, the Court in *Kaiser* found on the facts, as seen, that in all practical substance the requirements in question had been satisfied. In this latter respect the case is strikingly similar to the *Osborn* decision of the Supreme Court (fully discussed *infra*) and also to the factual situation in the *Katz* decision of the Supreme Court where, however, the eavesdrop had to be constitutionally disapproved because of the lack of any antecedent judicial warrant at all.

The Court in *Kaiser* then set forth its position concerning the retroactivity problem under the *Berger* case—a topic which we discuss separately *infra*.

Let us now note the *Morhouse* decision with a view to similar details affecting the validity of the present wiretapping. The Court held that if an evidentiary hearing should demonstrate that the eavesdrops (including the wiretaps) were based on improperly issued orders or were improperly executed under the pre-*Berger* standards of this State—the Court stating that "§ 813-a is fully applicable to the case at bar", citing *Kaiser*—the wiretaps would have to be suppressed.

The Court in *Morhouse* also specifically stated that it was concerned about the possibility that the wiretapping had

invaded the constitutionally protected confidentiality of attorney and client.

Finally, in *Sarisohn* the Court, as noted in our introductory argument, *supra*, disapproved a wiretap, on the authority of the *Kaiser* and *McCall* cases, by reason of the factual insufficiency of the "standard form" affidavit; and the matter was deemed not cured even by supplementary sworn verbal statements to the issuing Judges because those statements "were not recorded and, hence, did not become 'part of the record basis of the order' ".

We submit that the above described standards enunciated by this Court in the *Kaiser, Morhouse* and *Sarisohn* cases require disapproval of the wiretapping done in our case; and that such a decision in our case does not depend at all on the *Berger* decision, or even on the *Katz* or *Osborn* decisions. *Kaiser*, especially, makes it clear that the law of this State, without need for resort to any of the recent Supreme Court decisions, was violated by the instant wiretapping, in several decisive respects. This State's constitutional and statutory requirements, both as to electronic eavesdropping and as to search and seizure generally, were disregarded by the wiretapping activity in our case. The lack of an adequate factual showing of probable cause, the failure to specify the conversations to be seized, the failure to give even a remote indication that the stale allegations in the affidavits justified belief that permissible evidence of either "past" or "present" crime would be overheard, the poor probative quality of the affidavits, the dragnet way in which the order allowed and the actual wiretapping as done invaded a massive number of irrelevant and professionally confidential (doctor and patient) conversations, the utter lack of any indication of exigency, etc. —all of these incidents of the instant wiretapping are condemned by the *Kaiser-Morhouse-Sarisohn* standards which this Court has authoritatively declared to represent the long established principles of the constitutional law of search and seizure observed in this State.

As regards our above subheadings in this Point II which relate to the effects of the *Katz* case—*Katz* having further evolved the Supreme Court's thinking in *Osborn* and *Berger*—and the new position of the Supreme Court in *Katz* that State telephone wiretapping must comply with the Fourth Amendment, we submit as follows:

We have previously referred, in this brief, to our detailed analysis of the *Berger* opinion as contained in our printed motion for reargument, which we think collects all pertinent items in the *Berger* majority and minority opinions pointing to the inclusion of State telephone wiretapping in the Berger Fourth Amendment rulings as to electronic eavesdropping.

Also, in Point I, *supra*, we have discussed and quoted the pertinent items in the *Katz* decision which, by overruling the *Olmstead* case and by other unmistakable pronouncements, allow of no further doubt that State telephone wiretapping—no differently from any other official electronic search of human conversation—must henceforth comply with the Fourth Amendment.

In the *Kaiser* case this Court reasoned *arguendo* that *Berger* applies to telephone wiretapping, but the Court in *Kaiser* also set forth at length the reasons in support of an opposite view, the Court especially emphasizing that the United States Supreme Court had not yet expressly or unequivocally overruled the *Olmstead* case. We now respectfully ask the Court, in view of the indubitable overruling of *Olmstead* by *Katz*, to put to rest the doubts expressed in *Kaiser* as to whether State wiretapping must comply with the Fourth Amendment.

If this Court should take that step, the next logical step would be (as set forth in our subparagraphs "B" and "C" in the above heading for this Point II), to consider whether the *Berger* and *Katz* decisions (also *Osborn*) are applicable in deciding the present case, and to accord to those

decisions such degree or quantum of "retroactivity" as may be needed and proper on the facts of this case. We are not overlooking for one moment that in *Kaiser* and *Morhouse* this Court has already taken a firm and reasoned position on the question of the retroactivity of *Berger*. But we respectfully urge that the present appeal and reargument merit further consideration of the retroactivity problem.

In the *first* place, *Berger* was followed by *Katz*, *Katz* had not yet been decided at the time of the decisions in *Kaiser* and *Morhouse*, and *Katz* throws important new light on the retroactivity problem. For, in *Katz* the Supreme Court expressly rejected a plea by the Government that "because its agents relied upon the decisions in *Olmstead* and *Goldman*, and because they did no more here than they might have properly done with prior judicial sanction, we should retroactively validate their conduct." To this plea the Supreme Court replied, "That we cannot do", and the Court went on to point out in detail why such retroactive validation was constitutionally impermissible owing to non-compliance with the Fourth Amendment. (See 36 U.S. Law Week 4082-4083.)

Second, this Court's ruling in *Kaiser* (and *Morhouse*) banning retroactive application of *Berger*, adopted as the focal event in administering its ruling, the time of issuance of the particular ex parte wiretap order. We respectfully believe that this Court erred, in any event, in making such the focal event. The only arguably proper focal event for such purposes would be an event in the course of the particular prosecution or litigation involved, not the time of issuance of the ex parte eavesdrop order. None of the decisions of the Supreme Court of the United States which deal with the retroactivity problem in any setting relevant hereto, afford support for making the focal event the time of issuance of a search warrant or like order. All of those decisions (see discussion and citations *infra*) make the focal

event either pendency of an appeal, or date of commencement of a criminal trial, or previous existence of an appeal in which the issue had been preserved. We note that in Judge Christ's dissenting opinion in *Morhouse*, he evidently took it for granted that the focal event turned upon whether "trials are held after the date of the *Berger* decision". We therefore respectfully urge that, in this reargument, the Court should particularly consider whether its selection in *Kaiser* of the focal event as being the time of issuance of the eavesdrop order, raises a point "overlooked or misapprehended" within the meaning of Rule XX. This point, without more, may well prove dispositive of the present appeal and reargument, because our appellant Dr. Cohen has not yet been tried on the indictments in this case. The controlling Supreme Court decisions which have spoken on the retroactivity problem in situations other than those involving electronic eavesdropping, do not appear to support this Court's position on the subject in the *Kaiser* and *Morhouse* cases. In *Linkletter* v. *Walker*, 381 U.S. 618, 14 L. Ed. 2d 601 (1965) the Court held that the *Mapp* rule did not operate retrospectively upon cases finally decided prior to the *Mapp* case. Obviously, that dividing line is far transcended by the line laid down in the *Kaiser* case. See also the *Annotation* in 14 L. Ed. 2d 992. In *Tehan* v. *Shott*, 382 U.S. 406, 15 L. Ed. 2d 453 (1966), the Court made a similar ruling as to its decision in *Griffin* v. *California*, 380 U.S. 609, which had condemned adverse comment by a prosecutor or trial Judge upon a defendant's failure to testify in a State criminal trial; again, this *Tehan* ruling plainly is not authority for this Court's *Kaiser-Morhouse* retroactivity ruling. *In Johnson* v. *New Jersey*, 384 U.S. 719, 16 L. Ed. 2d 882 (1966), the Court ruled that the *Escobedo* and *Miranda* decisions were applicable only to those cases in which trial began after the decisions were announced. The *Johnson* rule, then, if applied to our case, would require giving effect to the *Osborn*, *Berger* and *Katz* decisions, since our case has not yet been tried on the indictments. In *Stovall* v. *Denno*, 388 U.S. 293, 18 L. Ed. 2d 1199 (1967), the

Court held that the "lineup" identification rule of the *Wade* and *Gilbert* cases should apply only prospectively from the date of the decision in *Stovall* v. *Denno* (June 12, 1967). The *Stovall* case is absolutely the highwater mark in the Supreme Court's process of choice favoring prospectivity over retroactivity in particular situations. The *Stovall* case did not involve the Fourth Amendment at all. No decision of the Supreme Court or any other Court involving Fourth Amendment issues, especially those gravest of all Fourth Amendment issues which are involved in electronic spying, has even remotely approached the unqualified prospectivity rule of the *Stovall* case—except, of course, this Court's recent decisions in *Kaiser* and *Morhouse*. In that area of electronic spying the overwhelming indications are to the contrary, as seen; we refer to the Supreme Court's refusal to confer retroactive validation on the Government's conduct in *Katz*, and to the still continuing "*Schipani* review program", which latter we shall now describe more fully.

Third, we mentioned earlier that the continuing "*Schipani* review procedure" is impossible to reconcile with any supposed rule of prospectivity-only in applying the Supreme Court decisions which subject electronic eavesdropping to the Fourth Amendment. In a "Supplemental Memorandum for the United States" filed by the Solicitor General in the Supreme Court in *Black* v. *United States*, No. 1029, October Term 1965, and in another such "Supplemental Memorandum" in *Schipani* v. *United States*, No. 504, October Term 1966, the Solicitor General informed the Supreme Court of the existence of a "policy" or "policies declared by the President on June 30, 1965, for the entire Federal establishment" which "prohibits [unlawful] electronic surveillance * * * (as well as the interception of telephone and other wireless communication) in all instances other than those involving the collection of intelligence affecting the national security." In those memoranda the Solicitor General further informed the Supreme Court that

in a memorandum of November 3, 1966 to all United States Attorneys the Department of Justice had ordered that no case or investigation proceed "which includes evidence illegally obtained or the fruits of that evidence." In the *Schipani* memorandum the Solicitor General further informed the Supreme Court as follows:

> "Recognizing its obligation not to use evidence obtained in violation of a defendant's protected rights in any criminal prosecution, the Department has initiated a program to discover prior instances in which this may have occurred. An extensive review is presently being conducted in order to determine the instances in which there might have been monitoring affecting a case which has been brought to trial * * *. Similarly, a careful review of pending and prospective prosecutions is being conducted by the Department for the purpose of determining what other cases might fall within this category. This will necessarily be a time-consuming process but will be diligently pursued to completion. The Government will promptly notify the appropriate court when any material discovery is made."

We do not have an exhaustive report as to the results of the *Schipani*-review procedure thus far, but in the reported proceedings of the Supreme Court alone (i.e., not including the lower Federal Courts) we know of several instances in which that Departmental review procedure has resulted in the reopening of criminal prosecutions and the vacating of judgments of conviction. E.g., in addition to the *Schipani* case itself, *supra*, see *O'Brian and Parisi* v. *United States*, October Term 1966, No. 823; *Granello and Levine* v. *United States*, October Term 1966, No. 750; *Hoffa* v. *United States*, 387 U.S. 231, 18 L.Ed.2d 738; and the previously cited case of *Kodol-Alderisio*, decided by the Supreme Court on January 29, 1968.

We therefore submit that, in connection with this Court's rulings on the retroactivity problem in *Kaiser* and *Morhouse*, consideration should now be given, in this reargument, to the above described *Schipani*-review items.

Turning now to the substantive standards enunciated in the recent Supreme Court cases, we shall not here burden the Court with a recapitulation of the standards laid down in *Berger* concerning judicial warrants for electronic searches, because this Court set forth and discussed those *Berger* standards in detail in its decision in *Kaiser*. We shall, however, quote the further elucidation of standards given by the Supreme Court in *Katz*—after which we shall describe also the Supreme Court's similar exposition in the *Osborn* case.

The following is quoted from *Katz* v. *United States*, 36 U.S. Law Week p. 4081:

> "The question remaining for decision, then, is whether the search and seizure conducted in this case complied with constitutional standards. In that regard, the Government's position is that its agents acted in an entirely defensible manner: They did not begin their electronic surveillance until investigation of the petitioner's activities had established a strong probability that he was using the telephone in question to transmit gambling information to persons in other States, in violation of federal law. Moreover, the surveillance was limited, both in scope and in duration, to the specific purpose of establishing the contents of the petitioner's unlawful telephonic communications. The agents confined their surveillance to the brief periods during which he used the telephone booth, and they took great care to overhear only the conversations of the petitioner himself.
>
> Accepting this account of the Government's actions as accurate, it is clear that this surveillance was so

narrowly circumscribed that a duly authorized magistrate, properly notified of the need for such investigation, specifically informed of the basis on which it was to proceed, and clearly apprised of the precise intrusion it would entail, could constitutionally have authorized, with appropriate safeguards, the very limited search and seizure that the Government asserts in fact took place. Only last Term we sustained the validity of such an authorization, holding that, under sufficiently 'precise and discriminate circumstances,' a federal court may empower government agents to employ a concealed electronic device 'for the narrow and particularized purpose of ascertaining the truth of the . . . allegations' of a 'detailed factual affidavit alleging the commission of a specific criminal offense.' *Osborn* v. *United States*, 385 U.S. 323, 329-330. Discussing that holding, the Court in *Berger* v. *New York*, 388 U. S. 41, said that 'the order authorizing the use of the electronic device' in *Osborn* 'afforded similar protections to those . . . of conventional warrants authorizing the seizure of tangible evidence.' Through those protections, 'no greater invasion of privacy was permitted than was necessary under the circumstances.' *Id.*, at 57. Here, too, a similar judicial order could have accommodated 'the legitimate needs of law enforcement' by authorizing the carefully limited use of electronic surveillance.

* * * * * *

And bypassing a neutral predetermination of the *scope* of a search leaves individuals secure from Fourth Amendment violations 'only in the discretion of the police.''

We note next the standards laid down in the *Osborn* case (*Osborn* v. *United States*, 385 U.S. 323, 17 L. Ed. 2d 394). It will be recalled that in *Osborn* the Supreme Court dealt

for the first time with an electronic auditing activity where prior judicial permission had been obtained.

For purposes of such comparison (and distinction with our case), the operative facts in *Osborn* were as follows:— On November 7, 1963 a man named Robert Vick had a conversation with Mr. Osborn in the latter's office, Osborn being an attorney for James R. Hoffa in a then pending criminal trial in the Federal Court in Nashville, Tennessee. In this conversation of November 7, 1963, which the parties continued in an adjacent alley outside Osborn's office, Vick and Osborn discussed bribing a prospective juror in the Hoffa trial. Immediately after this November 7 meeting with Osborn, Vick, who unbeknownst to Osborn had been operating as a Federal informer, reported the conversation to an agent of the United States Department of Justice. Vick was then requested to put his report in the form of a written statement under oath, which he did. The next day, November 8, this sworn statement of Vick was shown by Government attorneys to the two Judges of the Federal District Court, Chief Judge Miller and Judge Gray. After considering Vick's affidavit, the Judges agreed to authorize agents of the FBI to conceal a recorder on Vick's person to determine from recordings of further conversations between Vick and Osborn whether Vick's charges were true. When Vick went back to Osborn's office later that same day, November 8, the recording device did not work properly, and Vick made a written statement of what occurred during that meeting. The Government lawyers reported these circumstances to Chief Judge Miller, who then authorized that the recorder be used again on November 11, under stringent instructions (duplicating the original instructions on the first occasion when Judges Miller and Gray had authorized the use of the recorder) that "the tape recorder should be used under proper surveillance, supervision, to see that it was not faked in any way, and to take every precaution to determine that it was used in a fair manner, so that we could get at the bottom of it and determine what the truth was"

(17 L. Ed. 2d at 399, fn. 6). Chief Judge Miller also stated, in explaining why he and Judge Gray had approved the use of the recorder, that, "The affidavit contained information which reflected seriously upon a member of the bar of this court, who had practiced in my court ever since I had been on the bench. I decided that some action had to be taken to determine whether this information was correct or whether it was false. It was the most serious problem that I have had to deal with since I have been on the bench. I could not sweep it under the rug" (17 L. Ed. 2d at 399). Vick then went ahead and obtained the recording of a conversation of November 11, which indubitably inculpated Osborn.

In the *Osborn* decision, where the Justices who had concurred or dissented in *Lopez* v. *United States*, 373 U.S. 427 (except Mr. Justice Douglas who dissented in *Osborn*, and Mr. Justice Goldberg who had meanwhile resigned from this Court) joined, the Court, after describing the facts substantially as we have above set them forth, stated as follows (17 L. Ed. 2d at 399-400) (Court's footnotes omitted):

> "The issue here, therefore, is not the permissibility of 'indiscriminate use of such devices in law enforcement,' but the permissibility of using such a device under the most precise and discriminate circumstances, circumstances which fully met the 'requirement of particularity' which the dissenting opinion in Lopez found necessary.
>
> • • • • •
>
> So it was that, in response to a detailed factual affidavit alleging the commission of a specific criminal offense directly and immediately affecting the administration of justice in the federal court, the judges of that court jointly authorized the use of a recording device for the narrow and particularized purpose of ascertaining the truth of the affidavit's allegations. As the district judges recognized, it was imperative to determine whether the integrity of their court was

being undermined, and highly undesirable that this determination should hinge on the inconclusive outcome of a testimonial contest between the only two people in the world who knew the truth—one an informer, the other a lawyer of previous good repute. There could hardly be a clearer example of 'the procedure of antecedent justification before a magistrate that is central to the Fourth Amendment' as 'a precondition of lawful electronic surveillance.' "

Thus the Court in *Osborn* was apparently able to obtain a consensus which included some of the divergent Justices in the *Lopez* case.

The circumstances in *Osborn*—bearing no remote resemblance to the circumstances of our case*—included the following:—The situation to which the proposed electronic search was addressed in Osborn was in the highest degree a specific and particularized situation, both as regards the specificity of the criminal charge and the altogether practical feasibility of confining the electronic search to words or conversation which in all likelihood were going to relate exclusively to that specific criminal charge. Everything pointed to the fact that Vick was going to be meeting with Osborn on November 8, and then on November 11, specifically and solely for the purpose of carrying forward the specifically charged criminal project of bribing a juror in the *Hoffa* case. *Osborn* was in no sense, then, a situation in which the proposed electronic search for which advance judicial permission was sought was going to partake of a "general search".

Furthermore, there existed in the *Osborn* case a situation of authentic exigency (as in *Kaiser*), an arguably overriding need—" * * * It was imperative to determine whether the integrity of their Court was being undermined, and highly undesirable that this determination

* But in important respects resembling the situation in this Court's *Kaiser* decision.

should hinge on the inconclusive outcome of a testimonal contest between the only two people in the world who knew the truth—one an informer, the other a lawyer of previously good repute" (17 L.Ed. 2d at 400). This last puts a case for electronic search with advance judicial permission which is a far cry from the justification sought to be made in the present case.

Finally, contrast *Osborn* (and *Kaiser*) with our case as regards the egregiously slack, conclusory and probatively weak and unconvincing "factual showing" made before the "magistrate" in our case on the application for the electronic search "warrant", as contrasted with the meticulous and all but perfectionistically specific showing made to the District Judges in the *Osborn* case.

Concluding this Point II, we submit:—In addition to the unique posture of this case—the denial of certiorari by the Supreme Court only "for want of a final judgment"—as it affects the question of retroactivity versus prospectivity, the pre-*Berger* New York State standards of "search and seizure" in relation to electronic official spying, especially as set forth in the *Kaiser* and *Morhouse* cases, require disapproval of the wiretapping in this case. Of course, if the Court should conclude that by reason of *Katz* the same Supreme Court standards apply *in toto*, there is no doubt that the wiretap evidence herein must be suppressed—even without this Court's applying the *Berger* ruling that §813-a is unconstitutional on its face. In any event, under the *Kaiser-Morhouse* standards, the present wiretap fails of constitutional acceptability for several reasons—insufficient factual showing in the application, i.e., the unreliability of the informers, the attenuation of the hearsay used in the wiretap affidavits, the staleness of the alleged inculpatory information and, in short, the failure of the affidavits to establish "reasonable cause" or "probable cause"; non-exigency; excessive duration; absence of restriction to insure only discriminate eavesdropping within the minimum limits of

necessity; failure to particularize either the conversation to be overheard or the person; dubious need for the eavesdropping in point of the nature of the alleged crime involved, as posing no particular overriding public or private-safety need to resort to electronic spying. The ex parte Court order, and the execution of the permitted wiretapping, were grossly aggrieving under even minimal "search and seizure" tests as to scope and duration of the "search".

POINT III

Appellant Cohen respectfully renews his contentions in the appeal herein as to the mutual or inter-active taint as between the wiretap evidence and the search-obtained evidence; he also respectfully renews his contention as to the over-all circumstances of the conduct of the police which violated his constitutional rights in connection with the wiretap, the search, the spoliation of evidence, and the resort to indecent methods of investigation.

The contentions summarized in the above heading are set forth in detail in Dr. Cohen's brief on appeal in this Court, pp. 60-75.

We respectfully beg leave to renew these contentions upon this reargument, *first* because they ought to be considered integrally with the Fourth Amendment issues as to the wiretap; and *second*, because neither the Appellate Division nor this Court has heretofore rendered any specific opinion treatment concerning those contentions.

CONCLUSION

It is respectfully submitted, that, upon this reargument, the relief prayed for in our "Conclusion" to the appellant's brief in the appeal herein (p. 75) should be granted; and that such further relief should be granted as the Court may deem appropriate in view of the supervening decisions of this Court and of the Supreme Court of the United States.

Respectfully submitted,

KLEINMAN, GOLD & LANDSMAN
Attorneys for Appellant

EUGENE GOLD
Of Counsel

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUN 17 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term 1968

No. [redacted] 141

CARL I. COHEN,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

AARON E. KOOTA
District Attorney, Kings County
Attorney for Respondents
Municipal Building
Brooklyn, New York 11201

WILLIAM I. SIEGEL
Assistant District Attorney
of Counsel

32 CASE PRESS INC., 421 HUDSON ST., N.Y.—OREGON 5-4540

INDEX

	PAGE
Statement	1
Previous Proceedings	2
Jurisdiction	5
POINT I—Clarification of the issues presented by the petitioner	6
POINT II—The petition for the writ of certiorari should be denied	11

AUTHORITIES CITED

Cases

Berger v. New York, 388 US 41	6
Dombrowski v. Pfister, 380 U.S. 479, 14 L. ed. 2d 22, 85 S. Ct. 1116	10
Douglas v. City of Jeannette, 319 U.S. 157, 87 L. ed. 1323, 63 S. Ct. 877	10
Katz v. United States, 19 L ed 2d 576	6
People v. Kaiser, 21 NY 2d 86	7
Ex Parte Young, 209 U.S. 123, 52 L. ed. 714, 28 S. Ct. 441	9

PAGE

Statutes

Code of Criminal Procedure:

Section 813-a 2

Section 518-a 4, 8

28 U.S.C. Section 1257(3) 5

47 U.S.C. Section 605 5

United States Constitution

Fourth Amendment 5

Fifth Amendment 5

Fourteenth Amendment 5

IN THE

Supreme Court of the United States

October Term 1967

No.

CARL I. COHEN,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

Petitioner seeks a writ of certiorari to review an order of the Court of Appeals of the State of New York made April 18, 1968 (not as yet officially reported), which adjudged that an original decision of that Court, rendered July 7, 1966, be adhered to. The order followed the granting of petitioner's motion for reargument of the order of July 7, 1966 which had affirmed an order of the Appellate Division of the Supreme Court dated November 29, 1965 (24 AD 2d 900). The Appellate Division had modified, and as modified, affirmed, an order made by Honorable Dominic S. Rinaldi, a Justice of the Supreme Court, Kings County (42 Misc. 2d 403) dated March 13, 1964.*

---

* The petition includes as appendices these various orders; and the Court is respectfully referred thereto.

Previous Proceedings

Petitioner at all times herein concerned rested under five indictments found by the Grand Jury of Kings County in 1960 charging him with the commission of the crime of Abortion. In the course of judicial proceedings respecting these indictments he learned that on or about July 28, 1960 an order had been made by Honorable J. Vincent Keogh, then a Justice of the Supreme Court, pursuant to the provisions of the Code of Criminal Procedure, Section 813-a, which authorized the interception of telephone communications being transferred over a telephone located in petitioner's office in Brooklyn and registered on the records of the New York Telephone Company in his name.

He moved in the Supreme Court for two-fold relief. One form was for an order granting a hearing to determine whether or not the telephone interception order of July 28, 1960 had been issued after due compliance with the requirements of Code Crim. Pro. Section 813-a. The other type was for the vacatur of the authorizing order itself.

After argument before Honorable George A. Arkwright, a Justice of the Supreme Court, Kings County, the motion was denied by an order of February 26, 1963.

Petitioner appealed from the order, but on April 17, 1963 the Appellate Division of the Supreme Court, Second Judicial Department, unanimously granted the People's motion to dismiss the appeal. No opinion was written.

Petitioner then took action of two-fold nature. Upon the assumption that the order was made in a criminal action and that an appeal therefrom lay only by permission granted by a Judge of the Court of Appeals or a Justice of

the Appellate Division pursuant to Code Crim. Pro. Section 520, an application was made to Judge Fuld of the Court of Appeals for such leave to appeal. It was denied by him on July 10, 1963. Petitioner had simultaneously moved in the Court of Appeals for leave to appeal from the Appellate Division order of April 17, 1963. That Court denied leave to appeal on the same day, July 10, 1963. Neither Judge Fuld nor the Court of Appeals wrote an opinion.

Petitioner then petitioned this Court for a writ of certiorari to review the order made by Arkwright, J., but the Court on January 13, 1964 denied and dismissed the petition (375 U.S. 985).

After the denial by Fuld, J. and by the Court of Appeals of leave to appeal to that Court, but before the final action of this Court in denying the petition for certiorari, hearings which had begun on a motion in the former Kings County Court were resumed in the Supreme Court for relief identical with that denied by Arkwright, J. This motion was claimed to be necessitated by the reorganization of the New York Courts pursuant to which the former County Court was merged with and became part of the Supreme Court and former County Judge Rinaldi became a Justice of the Supreme Court. The long and voluminous hearings resulted in the order made by Rinaldi, J. which we here summarize for the convenience of this Court.

The order vacated the July 28, 1960 telephone interception order made by Keogh, J., restrained and precluded the District Attorney of Kings County and the Police Department from using upon petitioner's trial all telephone conversations obtained as a result of the wiretaps and all leads,

clues and information directly or indirectly obtained as a result thereof; restrained and precluded the District Attorney from calling as witnesses upon petitioner's trial the female persons named in the indictments against him as the abortees; restrained and precluded the District Attorney and the police from using upon the trial all evidence seized by a search of petitioner's home and office; and directed the return of the property thus seized.

The People appealed from this order. As a preliminary necessitated by Section 518-a of the Code of Criminal Procedure the People asserted that the deprivation of the use as evidence of the property ordered to be returned or suppressed had rendered the sum of the proof available to the People with respect to the criminal charges filed against petitioner either (1) insufficient as a matter of law, or (2) so weak in its entirety that any reasonable possibility of prosecuting such charges to a conviction had been effectively destroyed.

The Appellate Division modified the order by reversing that portion thereof which had held the original wiretap order invalid and also by reversing that portion which had precluded the People from using upon petitioner's trial the testimony of the prosecutrices; and as thus modified, affirmed.

Pursuant to permission granted by Fuld, J. on January 25, 1966 petitioner appealed to the New York Court of Appeals from the Appellate Division order. The Court of Appeals affirmed by the order of July 7, 1966 previously referred to.

Thereafter the Court of Appeals, by an order made December 29th, 1967, granted petitioner's motion for reargu-

ment. Briefs were submitted and oral reargument was had before the Court with the result that in the aforementioned order of April 18, 1968 the original decision of the Court of Appeals was adhered to.

It is, however, of the utmost pertinence to the present petition for certiorari to note that after the Court of Appeals affirmance of July 7, 1966 (18 N.Y. 2d 650), petitioner addressed to this Court a petition for the writ of certiorari. It was denied December 5th, 1966 "for want of a final judgment" (17 L. Ed. 2d 438 reh. den. January 16th, 1967; 17 L. Ed 2d 680).

The present petition for the issuance of the writ of certiorari by this Court follows.

Jurisdiction

Jurisdiction for the petition is sought to be invoked under 28 U.S.C. Section 1257 (3). Petitioner contends that his rights, privileges and immunities under the Fourth Amendment (unreasonable search and seizure), the Fifth Amendment (self-incrimination), and the Fourteenth Amendment (due process of law) of the Federal Constitution, and under 47 U.S.C. Section 605, were violated.

We answer that the same considerations which caused this Court to deny appellant's two earlier petitions for certiorari (and particularly the consideration that there is in this case no final judgment) are as pertinent to petitioner's present situation as they have always been. It is therefore our respectful and confident submission that the instant petition should be similarly denied.

POINT I

Clarification of the issues presented by the petitioner.

The present petition is in all but one of its arguments* a restatement in substance, and indeed in great part in language, of the contentions already twice rejected by this Court. Thus: of the forty-eight page opus (of which the first eighteen pages are a recitation of historical facts) fully one-third of the petition (pp. 36-47) is an argumentative reference to alleged improper police conduct in losing a desk diary calendar belonging to petitioner, in not preparing and retaining full reports of police activities and in coercing from one of the prosecutrices (Esther Richards) statements pertaining to an abortion which petitioner committed upon her, and in ultimately arresting her.

We repeat here what we wrote in our brief (dated November 1966) in answer to appellant's second petition for certiorari:

> "It is our submission that none of these alleged facts creates a Federal question for the scrutiny of this Court and therefore we enter into no combative analysis of the evidence which would disprove and destroy these claims of impropriety."

Petitioner again attacks the sufficiency of the wiretap affidavits concerned in the case and lists in detail their alleged infirmities (Petition, pp. 23-30). The petition affects a lack

---

* The exception consists of appellant's reliance upon *Berger* v. *New York*, 388 US 41 and *Katz* v. *United States*, 19 L ed 2d 576, which this Court decided after the December 5th, 1966 dismissal of the petition because of want of a final judgment. We discuss the relation of these cases to the present petition on p. 7 *et seq.* of this brief.

of understanding of the decisions of the Appellate Division and the Court of Appeals which sustained their legal and constitutional sufficiency. We suggest a very simple reason for the decisions of these respected Courts: that the affidavits were in fact and in law sufficient, when judged by the most stringent constitutional standards, to sustain the legality of the wiretap order.

Petitioner assesses the opinion of the Court of Appeals in *People* v. *Kaiser*, 21 NY 2d 86, and that Court's decision in his own case, as a holding by the Court that this Court's decisions in Berger v. New York, supra, and Katz v. United States, supra, are not to be accorded retroactively. In this assessment he is eminently correct. In *Kaiser*, Keating, J. wrote for a majority of six, Fuld, C.J. alone dissenting:

> "Applying these standards in the case at bar, we are led to the conclusion that the Berger decision should be given only prospective effect. The purpose of the exclusionary rule, to which Berger made eavesdropping evidence subject, is deterrence of future police conduct. Applying Berger retroactively will not, therefore, undo the violation of the defendant's rights which may have already taken place. The admission of the wiretap evidence has no effect on the 'integrity of the fact-finding process' (Linkletter v. Walker, supra). Indeed, the probative value of the evidence is beyond question. In addition, thousands of eavesdropping orders have been issued in reliance upon the statute and the decisions of this court which the Supreme Court had seen fit not to disturb. (See People v. Dinan, 11 NY 2d 350, cert. den. 371 US 877; People v. Pugach, 16 NY 2d 504, app. dsmd. 383 US 575; People v. Cohen, 18 NY 2d 650, cert. den. 385 US 976, rehearing den. 385 US 1032).* Moreover,

---

* The *Cohen* case mentioned by Keating, J., is petitioner's matter.

> even under prior law no eavesdropping order could be sustained without "procedure of antecedent justification before a magistrate', which is central to the Fourth Amendment. *Under these circumstances we hold that Berger should be held applicable only to those cases in which the orders were issued or the eavesdropping took place after the date of that decision.*" (Italics ours.)

Petitioner argues that nevertheless he is presently entitled by way of the writ of certiorari to a review of his case—which would be a review of *Kaiser*—because to relegate him to a review only after his conviction shall have occurred would create "a situation of altogether possible future severe injustice" to him (Petition, p. 8).

He realizes the hurdle which the argument faces in this Court's denials of the prior petitions for the writ of certiorari because of the want of a final judgment. He therefore attempts to demonstrate that in fact the prior proceedings in the State Courts have resulted in something which is analogous to a final judgment. It is, we believe, a fair summary of the argument thus to present it: The prosecution, by filing the statement required by Code Crim. Pro. Section 518-a, in effect admitted that the suppression of evidence directed by Mr. Justice Rinaldi would—if that direction remained in effect—destroy any reasonable possibility of prosecuting such charges to a conviction. This admission had the effect of making the suppression order "the equivalent of a final and not merely an interlocutory order" because "Justice Rinaldi's suppression order, under the operation of the law and practice of the State of New York in the manner above-mentioned, was the legal or jurisdictional equivalent of an order dismissing the indict-

ment or indictments involved" (Petitioner's present petition, p. 5).

It is our submission that this argument is one of desperation only, without any basis in fact or law. The phrase "final judgment" is the verbal expression of a legal status. That status (or perhaps better expressed, that stage in litigation) denotes a Court decree or judgment in which (in criminal cases) a defendant's guilt or innocence has been established. "Final" means in law exactly what it means in normal language: that the judgment is, at that point, the last result of all the prior proceedings in the litigation. Under no realistic construction of "final judgment" can it be said that the People were completely, and ultimately, and finally, and without recourse, barred from trying petitioner on the indictments. Reasonable possibility of prosecution may have disappeared—and this is all which Section 518a required the People to assert in order to be entitled to appeal from the order. *Non constat,* however, that the People might not procure from some other source evidence sufficient to constitute a workable basis for continued and completed prosecution.

The petition has yet another vital defect. It does not in *haec verba* pray for an injunction against prosecution; but, viewed realistically, this is the resultant relief which is actually sought.

While this Court has held that there exists Federal power to enjoin State prosecutions (*Ex Parte Young,* 209 U.S. 123, 52 L. ed. 714, 28 S. Ct. 441), it has nevertheless consistently "recognized that Federal interference with a State's good-faith administration of its criminal laws is peculiarly inconsistent with our Federal framework. It

is generally to be assumed that State Courts and prosecutors will observe constitutional limitations as expounded by this Court, and that the mere possibility of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings." (*Dombrowski* v. *Pfister*, 380 U.S. 479, 14 L. ed. 2d 22, 85 S. Ct. 1116). Accord: *Douglas* v. *City of Jeannette*, 319 US. 157, 87 L. ed. 1323, 63 S. Ct. 877. As Mr. Justice Brennan wrote in *Dombrowski, supra* (foot-note 3):

"It is difficult to think of a case in which an accused could properly bring a state prosecution to a halt while a federal court decides his claim that certain evidence is rendered inadmissible by the Fourteenth Amendment."

The foregoing discussion is not based upon a theoretical assumption, but upon the actual condition of the case in the State Supreme Court. On June 3, 1968, the case was called for trial in that Court. Defense counsel asked for a postponement. The District Attorney agreed to a postponement, but only until July 1, 1968. The District Attorney also stated that unless the trial were stayed by a Court empowered to do so, the People would be ready, and would press, for trial on the adjourned date. At the time of this writing, no notice has been served by petitioner's counsel on the District Attorney that a stay has been applied for to any Court or Judge.

We imply no criticism of petitioner, and we mean no disrespect for his counsel, when we say that the presentation to this Court of the present petition at this stage of the litigation is a repetition of identical maneuvers in

almost identical conditions in the past. We realize that appellant is entitled to exhaust every avenue of relief which he believes to be open to him and that his counsel not only have the right, but are under the duty, of forwarding his interests by the exercise of all their considerable skill. Nevertheless, it is, we submit, completely obvious that petitioner has presented on his present application no facts which should move this Court to depart from its prior holdings on previous petitions. The final judgment which was then wanting is still absent in the records of the case. Until a final judgment is had, petitioner shows no good reason why the invariable rule of this Court—not to restrain a State prosecution either directly or by inescapable effect—should not be followed and enforced.

POINT II

The petition for the writ of certiorari should be denied.

Dated: Brooklyn, New York,
June 1968.

Respectfully submitted,

AARON E. KOOTA
District Attorney
Kings County

WILLIAM I. SIEGEL
Assistant District Attorney
Of Counsel.